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October Term, A. D. 1954.

I.A. 229

APPEAL FROM THE
CIRCUIT COURT OF
KANE COUNTY.

vs.

Defendant-Appellant.

Defendant Paul Egan, individually and as Mayor of the City of Aurora, Illinois, has taken this appeal from a permanent injunction issued against him whereby he was enjoined from interfering with the issuance of salary warrants by the City of Aurora and from refusing to sign such salary warrants. He was also restrained from issuing orders or directives or memoranda to the Police Department of the City of Aurora or to the Chief or Acting Chief of the Police department; from issuing orders to the police department to commit illegal and unlawful acts; and from interfering with the administrative duties of the Chief or Acting Chief and all officers and members of the Police Department of Aurora. The suit out of which this controversy arises was brought by Plaintiff Donald Curran, as the Acting Chief of the police department of the City of Aurora, and by him as an individual and as a citizen and taxpayer of the City of Aurora.

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U.S. AIR

OFFICE OF THE DIRECTOR

MEMORANDUM FOR THE DIRECTOR
SUBJECT: [Illegible]

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A temporary injunction, subsequently made permanent, was issued restraining the defendant, who is the duly elected and acting Mayor of the City of Aurora, from doing the acts just enumerated.

In his complaint for an injunction, the plaintiff alleged that he was a citizen of the United States of America and a resident of the City of Aurora, and had been for more than forty years; that the City of Aurora is a municipal corporation and governed by and operating under the commission form of municipal government; that the City of Aurora had adopted "An Act to Regulate The Civil Service of the City" and was a city of more than fifty thousand population; that the defendant was the duly elected and acting Mayor of the City of Aurora; that during all times herein complained of the plaintiff was the duly appointed and qualified Acting Chief of Police of the Police Department of Aurora, Illinois; and that the City Council of the City of Aurora by resolution, a copy of which was attached to the complaint, duly consented to the appointment of the plaintiff to serve as Acting Chief of Police for a period of one year, which said appointment would terminate on June 10, 1954; that during all of this time the City Council had and presently had the sole and exclusive power to discharge the plaintiff from his office as Acting Chief of Police, but at no time since his appointment has the City Council rescinded the appointment but, on the contrary, has refused to consent to the discharge of plaintiff as Acting Chief of Police.

Plaintiff then alleged that the defendant had commenced a course of action whereby he sought to remove the plaintiff from his office and had illegally sought to discharge the plaintiff in opposition to such removal by the City Council and that the defendant had maliciously and wilfully refused to sign several payroll warrants drawn by the City of Aurora to compensate him for his services rendered as Acting Chief of Police, and that the defendant maliciously and wilfully refused to deliver these

payroll warrants to the plaintiff; that defendant has commenced a course of conduct whereby he has proclaimed to the members of the police department that the plaintiff is no longer the Acting Chief of Police, which has caused the members of the police department to become uncertain as to the exact status of plaintiff, and this has resulted in a breakdown in the chain of command and has severely impaired the efficiency of the police department; that the defendant has recently commenced a course of conduct whereby he has directed the plaintiff and other officers of the police department to commit illegal acts as follows:

(a) That on the 7th of November, 1953, the defendant directed the plaintiff and other members of the police department to barricade, stop and obstruct the passage of truck traffic through the City of Aurora, contrary to the laws of the State of Illinois and the United States of America; (b) that on the 18th of November, 1953, the defendant ordered a member of the police department to unlawfully eject a citizen of the City of Aurora from the council chambers of said city without cause; and (c) that on the 18th of November, 1953, after the regular meeting of the City Council had been adjourned, the defendant unlawfully ordered a member of the police department to force the remaining members of the council to return to the council chambers, notwithstanding that they desired not to do so.

It is next alleged by the plaintiff that the defendant was subjecting the plaintiff and other officers and members of the police department either to commit unlawful acts or to face charges of insubordination for failure to follow orders; that because of the acts of the defendant the personal and property rights of the plaintiff and other members and officers of the police department have been and will be severely jeopardized and impaired, and the morale and efficiency of the police

department of the City of Aurora will be impaired and the members thereof subjected to a multiplicity of suits, and it will in the future be impossible for the said police department to protect properly the safety and welfare of the citizens of the City of Aurora and their property; and that plaintiff will be irreparably injured unless the defendant is restrained from continuing such illegal acts and that plaintiff has no adequate remedy at law.

The prayer of the complaint was that the defendant, individually and as the Mayor of Aurora, be restrained during the pendency of this action from withholding or in any way interfering with the receipt of the payroll warrants issued to the plaintiff by the City of Aurora as his salary as Acting Chief of Police; that the defendant be directed by injunction during the pendency of this action to affix his signature to any warrants for lawful compensation drawn by the City of Aurora and issued to the plaintiff, and to direct defendant to deliver these warrants to the plaintiff; that the defendant be restrained by an injunction during the pendency of this action from issuing memoranda, orders or directions to the police department of the Acting Chief thereof which are in derogation of the right of the plaintiff to hold office as Acting Chief of Police of Aurora until such time as the latter might resign or be removed pursuant to law; that the defendant be restrained by injunction during the pendency of this action from issuing orders to the plaintiff and other officers of the police department to commit illegal and unlawful acts; that defendant be restrained from interfering in any way with the administrative duties of the plaintiff and other members of the police department or from harassing or interfering with the right and proper management of the police department.

Department of the Interior, Bureau of Land Management, Washington, D. C.

On November 20, 1953, the Circuit Court issued a temporary injunction, without notice and without bond, in substantial conformity with the prayer of plaintiff's complaint. By this temporary injunction, the defendant was restrained from interfering with the payroll warrants issued to the plaintiff and from refusing to sign and deliver the same. He was further restrained from issuing orders to the plaintiff, in derogation of his rights and from issuing orders to plaintiff and the other members of the police department to commit illegal and unlawful acts and from interfering with the administrative duties of the plaintiff and other officers and members of the police department.

By his answer, the defendant in his capacity as Mayor, admitted the plaintiff was appointed in the manner and form alleged in the complaint, but denied the City Council had the sole and exclusive power to discharge the plaintiff. He alleged he was the duly elected and acting Mayor of the City of Aurora and Commissioner of Public Affairs, by virtue of the statutes of the State of Illinois, and that as such Mayor and Commissioner of Public Affairs he was by Ordinance 2897 of the Ordinances of the City of Aurora (a copy of which he attached to and made a part of his answer) empowered and authorized to completely superintend the Department of Police and the property, equipment, records and personnel thereof, and to direct the activities and affairs and personnel of said police department. He also attached to and made a part of his answer a copy of Ordinance 2898, which recited in substance that the commissioner of each department was vested with the sole right and power to discharge the heads of all the principal departments of which he was the commissioner. He then asserted that since he was by ordinance and the statutes of the State of Illinois Commissioner of the Department of Public Affairs, he had the lawful right and authority to discharge plaintiff.

In his individual capacity, the defendant moved to vacate the injunction. In this motion he alleged that the complaint failed to set forth facts warranting the issuance of an injunction, temporarily or otherwise, because the plaintiff had a plain and adequate remedy at law, that a court of equity has no jurisdiction over matters involving political questions and that only political questions were involved in plaintiff's complaint, and that a court of equity is not the proper forum to adjudicate the right, title and interest of an individual in and to a public office. Subsequently, he incorporated this motion to vacate in the answer which he filed in his capacity as Mayor, and his answer as Mayor ~~incorporated~~ *incorporated* ~~this motion to vacate~~ *he adopted as his answer in his individual capacity.*

The cause was heard on the complaint and answer and over the objection of the defendant that the court lacked jurisdiction of the subject matter. On June 5, 1954, the court entered a final decree granting a permanent injunction against the Mayor, restraining him from interfering with the receipt of payroll warrants issued by the City of Aurora and the execution and delivery of said warrants and restraining him from refusing to sign these warrants; from issuing memoranda, orders or directives to the police department, the Chief or Acting Chief thereof; from issuing orders to the police department, the Chief or Acting Chief thereof to commit illegal and unlawful acts and from interfering with the administrative duties of the Chief or Acting Chief and other officers and members of the police department. In its decree, the court found that Ordinance 2898 vested the power to appoint and discharge heads of departments in the commissioner of each department, with the appointment being subject to confirmation by the City Council;

that the court was in doubt as to who appointed plaintiff Acting Chief of Police since the leave of absence resolution attached to the complaint recited the appointment was made by the City Council; that the defendant discharged the plaintiff for refusing to prefer charges against a police captain and that the next day the differences between the plaintiff and the defendant were apparently settled; that on November 7, 1953, the defendant ordered the plaintiff to barricade certain highways because of truck traffic and the plaintiff refused to do this and that such conduct by the defendant in stopping and re-routing truck traffic cannot be countenanced; that on November 10, 1953, the City Council adopted a resolution directing the defendant as Mayor of the City of Aurora to conform to the laws of the United States, the State of Illinois and the ordinances of the City of Aurora and rejected the request of the defendant to discharge the plaintiff. Other findings of a minor nature are contained in the decree. The decree also recited: "The facts heretofore found indicate a disregard by the defendant Mayor of orderly process in the conduct of the affairs of the City. The methods utilized in the stopping and re-routing of truck traffic, although it may have been desirable for the residents of the City, cannot be countenanced. The other incidents, such as the failure to execute authorized payroll warrants; giving direct orders to members of the Police Department other than through the normal chain of command; attempting on two occasions to discharge the Chief of Police, and the attempt to appoint a substitute Chief; demands or threats to prefer charges against policemen or officers apparently without any basis; the request to a deputy sheriff to take over; the ejecting of a reporter of the Aurora Beacon News from the Council meeting; and other incidents, denote an unusual

that the court was in doubt as to whether the plaintiff was entitled to relief since the law of a state which was not the law of the United States. The court was divided 5-4. The majority opinion was written by Chief Justice Warren and was joined by Justices Black, Brennan, Douglas, and White. The dissenting opinion was written by Justice Clark and was joined by Justices Harlan, Stewart, and Tamm. The majority opinion held that the plaintiff was entitled to relief since the law of the United States was the law of the state in which the plaintiff was domiciled. The dissenting opinion held that the plaintiff was not entitled to relief since the law of the state in which the plaintiff was domiciled was not the law of the United States.

trend of circumstances which, if permitted, would be detrimental to the orderly processes of government and confusing to the members of the Police Department in the exercise of their purpose and function, and would result in a multiplicity of lawsuits should the members of the Police Department follow out such orders of the defendant".

The defendant's contention on this appeal is that a court of equity has no jurisdiction over the subject matter set forth in plaintiff's complaint. The plaintiff's theory is that the trial court had full power to enter an order restraining the defendant from proceeding illegally to impair the rights of the plaintiff and the other members of the police department, and from subjecting the plaintiff and others to a multiplicity of suits by virtue of his illegal acts.

In Michels v. McCarty, 196 Ill. App. 493., one Frank Michels filed a complaint against Charles S. McCarty for an injunction. Michels' complaint alleged he was a resident, citizen and taxpayer of the City of Aurora; that for seventeen years he had been City Marshall there and now occupied that office; that no proceedings had been filed before any lawful authorities seeking his removal from office; that no action had been taken by any lawful authority to remove or suspend him from said office; that although he was the lawful holder of the office of City Marshall of the City of Aurora the Mayor illegally appointed one McCarty to said office and submitted the appointment to the City Council, and the City Council voted not to confirm the appointment; that later on, on the same day that the Council refused to confirm the appointment, the Mayor unlawfully appointed McCarty as the Acting Chief of Police, which said office was not open to appointment but was being lawfully held by Michels. The complaint then went on to allege that McCarty claimed to be the City Marshall and Chief

of Police and was attempting to intrude himself into that office and was hindering and preventing Michels from discharging the duties of that office and that McCarty had threatened to usurp said office, and that McCarty would carry out his threats unless he was restrained from so doing and would then inflict irreparable injury upon Michels. A temporary injunction was issued as prayed for in the complaint. The defendant moved to dissolve the injunction for various reasons, among which were there was no equity on the face of the complaint; that the court had no jurisdiction of the subject matter; that plaintiff had an adequate remedy at law; and that the relief prayed was political in character and not for the protection of property rights. Defendant's motion to dissolve was overruled and an appeal followed.

The court on appeal in deciding the issues presented said at Page 500, "The office of City Marshall is political in its character and is one of the agencies by which the government of the City is conducted. It is well settled that courts of equity will not take jurisdiction of political controversies, nor undertake to control the government of the State or of Cities or of other governmental agencies." The court then went on to analyze and discuss several decisions on the political nature of the controversy involved, one of which was Delahanty v. Warner, 75 Ill. 185. In that case, Delahanty filed a bill in equity alleging he was Superintendent of Streets of the City of Peoria and had been unlawfully removed from his office. He sought an injunction to restrain the Mayor and aldermen from appointing a successor and from interfering with him in any way from discharging the duties of his office. A temporary injunction was dissolved and the bill dismissed for want of equity. This decision was appealed to the Supreme Court, and in affirming that ruling the Supreme Court held that Delahanty had a complete remedy at law and that if he had not been properly removed and if a successor

could not therefore be legally appointed that question could be settled by an action of law against the person claiming to be his successor in office, and also that if by the action of the Mayor and aldermen he was unlawfully deprived of any fees and emoluments pertaining to his office he had a complete remedy therefor at law. Another case analyzed in the Michels case is Sheridan v. Colvin, 78 Ill. 237. There, an election had been held for the reincorporation of the City of Chicago, which election resulted in favor of reincorporation and the City Council had passed and the Mayor approved an ordinance for the reorganization of the police department. However, there was pending a suit at law to determine the validity of the election favoring reincorporation. Sheridan and others were police commissioners at the time of the alleged new reincorporation, and they filed their suit against the Mayor and City Council and other officers to restrain all acts under the ordinance passed by the City Council and approved by the Mayor on the ground that they possessed the only authority to control the police force and the public property belonging to the police department. A temporary injunction was issued, but *upon appeal these questions were discussed* it was afterwards dissolved and the suit dismissed, *the third* of which was whether a court of equity had jurisdiction to interfere with the action of *the* City Council. As set out in Michels v. McCarty, 196 Ill. App. 493, at 501, the Supreme Court "held that a court of equity had not that power; that the subject was purely political; that the subject-matter of the jurisdiction of courts of equity is civil property; that injury to property, actual or prospective, is the foundation on which the jurisdiction rests; that matters of a political character do not come within the jurisdiction of a court of equity, and that such court cannot interfere with the public duties of

any department of government except under special circumstances and where necessary for the protection of rights of property."

Another case discussed in *Michels v. McCarty* is that of *Heffran v. Hutchins*, 169 Ill. 550. Heffran had been Chief of the Fire Department and his term of office had expired and the Mayor had appointed other parties who were not confirmed by the City Council. Heffran continued to hold the office thereafter for a year and the Mayor made several appointments, all of which were rejected by the council. He then removed Heffran and told him to vacate the office and turn over the property of the department to a subordinate officer. Heffran filed a Bill in equity and obtained an injunction restraining the Mayor from removing him from office or interfering with him in his office until his term expired or until he should be lawfully removed. The case ultimately reached the Supreme Court. The Supreme Court held, as set forth in *Michels v. McCarty*, at Page 504, "that a court of equity had no jurisdiction to interfere with the public duties of the departments of government, but only to maintain property rights as distinguished from political rights, and that it had no jurisdiction to determine political questions between a mayor and a council of a city concerning the appointment and removal of officers, nor determine the right of a party to an office."

Other cases are considered in the *Michels* case, but we believe that we have discussed a sufficient number of them to illustrate the rule which applies in a situation such as is presented by this record. *Marshall v. Illinois State Reformatory* 201 Ill. 9, is substantially to the same effect as *Michels v. McCarty*.

In the light of the foregoing authorities, we are of the opinion that the permanent injunction issued by the trial

Two copies of the report were submitted to the Bureau and the State Department.

court in this case was improvidently granted. As we view it, the office of the Chief of Police of the City of Aurora is a political office, and this controversy concerns the occupant of such office and thus presents a political question. We do not see, nor has it been pointed out to us, how any property rights of plaintiff are involved in his claim to the office in question for which he does not have an adequate remedy at law. The disputed question concerning his appointment presents a question which is legal in nature and not one over which a court of equity takes cognizance. The matters involved in this case pertain solely to the political administration of the affairs of the City of Aurora, and if the defendant has disobeyed the law, the party injured has an adequate remedy at law. As pointed out in *Michels v. McCarty*, 196 Ill. App. 493, at page 507: "Great confusion might result if a mayor were enjoined from enforcing his statutory authority until it was determined whether he was pursuing the precise course prescribed by law. The action invoked here could be carried to the length of causing a court of equity to assume the government of a city. Many situations can be supposed in which under such a rule a court of equity could be used to the great detriment of municipal and state governments."

The Circuit Court of Kane County did not have jurisdiction of the subject matter of plaintiff's complaint, and its decree granting the injunction prayed for must be reversed.

Decree reversed.

Page 14
File.

Gen. No. 10799

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a term of the Appellate Court, begun and held at
Ottawa, on Tuesday, the 1st day of February, in the year
of our Lord one thousand nine hundred and fifty-five, within
and for the Second District of Illinois:

Present -- Honorable FRED G. WOLFE, Presiding Justice
 Honorable FRANKLIN R. DOVE, Justice
 Honorable DEWITT S. CROW, Justice
 JUSTUS L. JOHNSON, Clerk
 EDWARD R. LAMBERT, Sheriff

BE IT REMEMBERED, that afterwards, to-wit:
On March 21, 1955, the same being one of the days of
 upon petition for rehearing
the term of Court aforesaid, the Opinion of the Court/was
filed in the Clerk's Office of said Court, in the words and
figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

February Term, A.D. 1955

DONALD CURRAN, Acting Chief of
the Police Department of Aurora,
Illinois, a Municipal Corpora-
tion; DONALD CURRAN, Individually,
and as a citizen and as a taxpayer,
of the City of Aurora, Kane County,
Illinois,

Plaintiff-Appellee,

vs.

PAUL EGAN, Individually, and as Mayor
of the City of Aurora, Illinois,
Defendant-Appellant.

Appeal from the
Circuit Court of
Kane County

UPON PETITION FOR REHEARING

Per Curiam:

Counsel for appellee, Donald Curran, in his petition for rehearing calls our attention to the fact that on September 8, 1954, the City of Aurora filed herein a motion and that prior to the submission of the case at the October Term, 1954, of this court, an order was entered taking this motion with the case and that in the opinion filed no reference was made to this motion.

Donald Curran instituted this proceeding. His complaint recites that he brought the suit in his individual capacity and as a citizen and as a taxpayer of the City of Aurora and as acting chief of the police department of that city. The complaint named Paul Egan, sole defendant individually and as Mayor of the City of Aurora. Messrs. Curran and Egan are the only parties to this record.

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IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

January 1955

<p>Plaintiff's Exhibit</p> <p>Exhibit A</p> <p>Exhibit B</p> <p>Exhibit C</p> <p>Exhibit D</p> <p>Exhibit E</p> <p>Exhibit F</p> <p>Exhibit G</p> <p>Exhibit H</p> <p>Exhibit I</p> <p>Exhibit J</p> <p>Exhibit K</p> <p>Exhibit L</p> <p>Exhibit M</p> <p>Exhibit N</p> <p>Exhibit O</p> <p>Exhibit P</p> <p>Exhibit Q</p> <p>Exhibit R</p> <p>Exhibit S</p> <p>Exhibit T</p> <p>Exhibit U</p> <p>Exhibit V</p> <p>Exhibit W</p> <p>Exhibit X</p> <p>Exhibit Y</p> <p>Exhibit Z</p>	<p>Defendant's Exhibit</p> <p>Exhibit A</p> <p>Exhibit B</p> <p>Exhibit C</p> <p>Exhibit D</p> <p>Exhibit E</p> <p>Exhibit F</p> <p>Exhibit G</p> <p>Exhibit H</p> <p>Exhibit I</p> <p>Exhibit J</p> <p>Exhibit K</p> <p>Exhibit L</p> <p>Exhibit M</p> <p>Exhibit N</p> <p>Exhibit O</p> <p>Exhibit P</p> <p>Exhibit Q</p> <p>Exhibit R</p> <p>Exhibit S</p> <p>Exhibit T</p> <p>Exhibit U</p> <p>Exhibit V</p> <p>Exhibit W</p> <p>Exhibit X</p> <p>Exhibit Y</p> <p>Exhibit Z</p>
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EXHIBIT LIST

For reference:

The following exhibits were introduced in the trial of the case of *United States v. [Name]*, No. 100-CR-100, in the Southern District of New York, on January 19, 1955. The exhibits were introduced by the Plaintiff, [Name], and the Defendant, [Name]. The exhibits were introduced in accordance with the rules of the Federal Rules of Evidence. The exhibits were introduced in the following order: Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F, Exhibit G, Exhibit H, Exhibit I, Exhibit J, Exhibit K, Exhibit L, Exhibit M, Exhibit N, Exhibit O, Exhibit P, Exhibit Q, Exhibit R, Exhibit S, Exhibit T, Exhibit U, Exhibit V, Exhibit W, Exhibit X, Exhibit Y, Exhibit Z.

The motion of the City of Aurora above referred to was presented to the clerk of this court on September 8, 1954. This motion requested the court "to stay any further steps/^{to appeal} to the Appellate Court, Second District of Illinois, the above entitled cause of action insofar as any interest of the City of Aurora is involved or concerned." The clerk filed this motion, and it is this motion which was taken with the case. It is not a motion made by any party to the record. A stranger to the record, without any authority so to do, presented a motion to the clerk and it was inadvertently filed by him, and this court inadvertently entered an order taking the motion with the case. That order is now vacated, and the motion of the City of Aurora filed herein on September 8, 1954, is stricken from the files, and the petition for rehearing is denied.

Rehearing denied.

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FILED
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APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

David P. Malott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

At the October Term, A. D., 1954

5 I.A. 230^{2d}

NO. 54-0-4.

Agenda No. 13

A. M. PERRINE and PEARLE ALYCE)	
PERRINE, a Partnership, Doing)	
Business as PERRINE & PERRINE,)	
Plaintiffs-Appellees,)	Appeal from the
)	Circuit Court of
vs.)	Fayette County,
)	Illinois.
R. H. TROOP and R. H. TROOP, Producer,)	
Defendant-Appellant.)	
)	
)	

BARDENS, J.

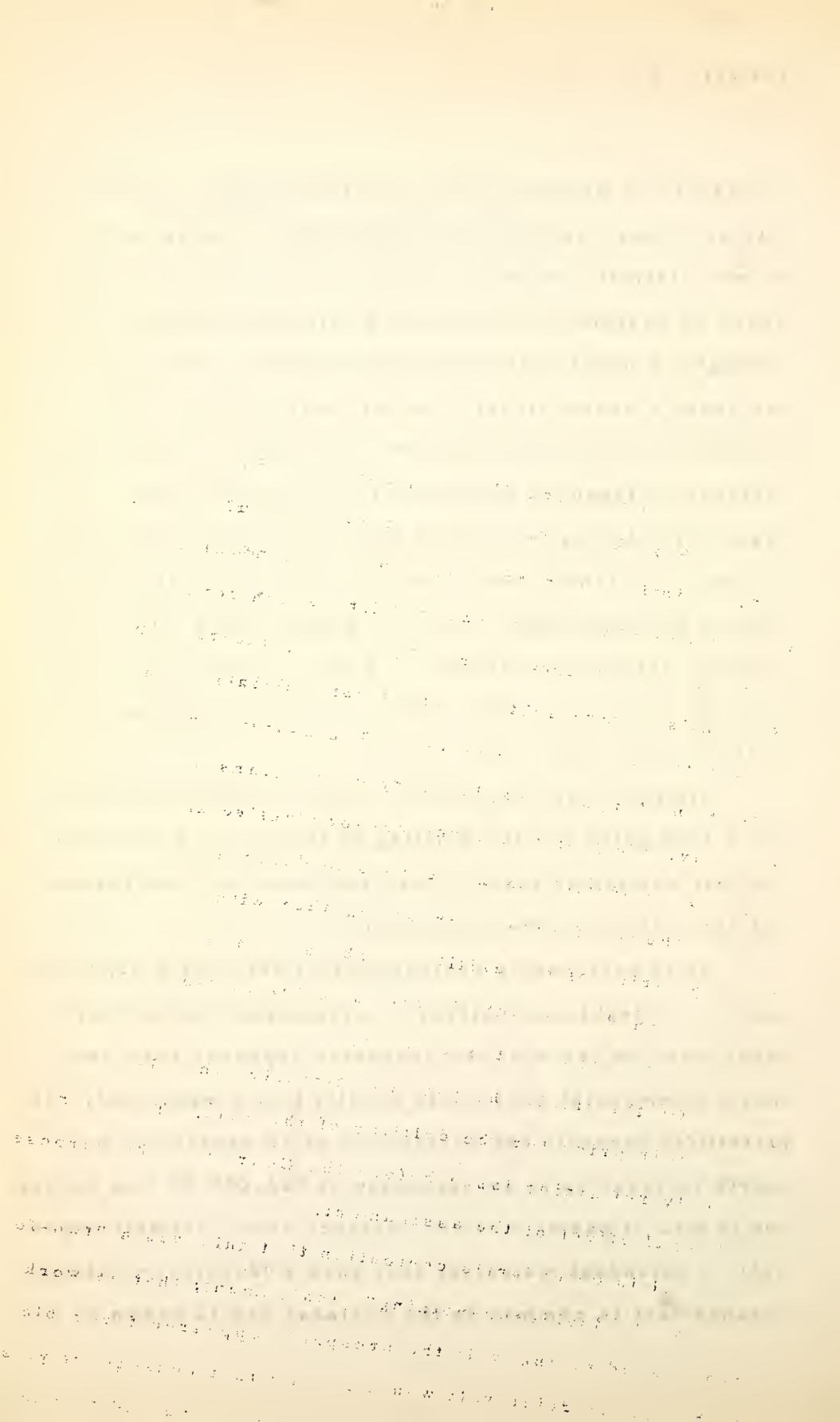
Plaintiffs, partners in an oil well-drilling business, filed a complaint against defendant in the Circuit Court of Fayette County alleging an oral contract for the drilling of an oil and gas test on defendant's leasehold in Clay County, Illinois. Trial before the Court alone resulted in a verdict for plaintiffs in the amount of \$11,000.00. Defendant relies on an accord and satisfaction in his contention that the judgment is against the manifest weight of the evidence.

During the latter part of January, 1953, plaintiffs and defendant entered into an oral contract for the drilling of an oil test for an agreed consideration. By the morning of February 7, 1953, the drilling had gone to the required depth and core samples had been taken and submitted to a

laboratory at Robinson, Illinois, for analysis. Later, this same day, but before the laboratory results were known, plaintiff and defendant went to defendant's office where an assignment was entered into which conveyed to plaintiffs a one-fourth overriding royalty interest in defendant's seven-eighths^h interest until plaintiffs had received the sum of \$22,000.00. The assignment contains no language explanatory of the transaction. Subsequently, the test was found non-productive and the hole plugged. Plaintiffs then returned to defendant the assignment of the one-fourth interest together with a bill for the contract price of the drilling. The assignment was thereupon returned to plaintiffs with a letter stating that it was in full settlement of the account.

On the trial, the parties stipulated that \$11,000.00 was a fair price for the drilling of the well. Therefore, the only remaining issue before the Court was the purpose and legal effect of the assignment.

It is defendant's contention that this was a "two-for-one" or a "double-or-nothing" assignment; that as work progressed on the well the prospects appeared favorable that a commercial well would result; that consequently, at plaintiffs' request, the assignment of an overriding one-fourth interest up to an aggregate of \$22,000.00 was worked out in lieu of payment of the contract price for drilling the well. Defendant maintains that such a "double-or-nothing" arrangement is common in the business and is known as an



oil payment. He testified that plaintiffs had discussed with him on an earlier occasion drilling a well for an oil payment on a "two-for-one" basis, but that no such agreement was made as to the instant drilling until the work had been completed; that after the core had been pulled, he decided to take plaintiff up on his "two-for-one" offer; that they thereupon went to his office and had the assignment drawn up; that no discussion was had as to what would happen if the well didn't produce because they all assumed that it would produce. In addition to this testimony, defendant presented the testimony of two oil men, one of whom testified he had heard plaintiff state, prior to drilling this well, that he would like to drill for an "oil payment," the other testifying that after the assignment had been executed, plaintiff stated, "I think I made a good deal." In addition, defendant's bookkeeper testified generally as to the circumstances of the execution of the assignment.

Plaintiff's testimony is completely contradictory with respect to the assignment. He testified that defendant asked him to take a "two-for-one" payment in oil for his drilling services because he needed to drill three more wells, equip the one that had just been drilled, and was buying an automobile agency; that he would be unable to do the necessary financing at the bank and, therefore, was willing to pay double out of production. Plaintiff further testified that it was agreed that if the well was dry, he was to be

paid on the drilling contract and that this understanding was acknowledged by defendant on two occasions.

On this appeal, defendant relies heavily upon necessary inferences said to arise from the transaction which corroborate his version of the assignment. The first circumstance is the matter of the timing of the assignment, it having been drawn up before the results of the core tests were known. The second circumstance involved plaintiff's calling the laboratory to ascertain their preliminary findings before accepting the assignment. Defendant argues that if the "two-for-one" arrangement merely established a mode of payment in the event the well produced, there would have been no reason to execute the assignment until the laboratory results were known; further, that there would have been no reason for plaintiff's calling the laboratory before agreeing to the assignment in such case; that such call indicated that plaintiff was taking a gamble.

Conceding that these are permissible inferences to be drawn from such circumstances, we are not prepared to say that they are so forceful and conclusive as to make the trial Court's finding on the weight of the evidence erroneous. The trier of facts could just as readily have drawn different inferences, e. g., that plaintiff was concerned about overall production possibilities of the well and called the laboratory because he wanted some idea of how long it would take him to collect his money on an oil-payment basis.

Of course, the conclusion arrived at by the trial judge

as to the preponderance of the evidence should stand unless clearly contrary to the manifest weight of the evidence. Prudential Insurance Co. vs. Spain, 339 Ill. App. 476, 90 N. E. (2d) 256. The question presented for decision was a wholly factual one and turned upon the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn therefrom. The evidence was in total conflict as to what the parties intended or understood the effect of the assignment to be. Yet the instrument was drawn by defendant's agent and could have explicitly stated that it was in full payment for drilling services rendered. In fact, one is persuaded that such would have been done if it had been so intended.

The trial court observed the witnesses, heard their testimony and found for the plaintiff. From a review of the record, we do not feel that such finding is against the weight of the evidence.

Judgment affirmed.

Culbertson, P. J. and Scheineman, J. concur.

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1 5 I.A.^{2d} 231

RITZ-CENTRAL MOTORS, INC.,)	
a corporation,)	APPEAL FROM MUNICIPAL
Appellant,)	COURT OF CHICAGO.
v.)	
PETER VANDERWOUDE,)	
Appellee.)	

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE
OPINION OF THE COURT.

A suit for conversion of an automobile was heard before a jury, which found for the defendant. Motions were made by the plaintiff for judgment notwithstanding the verdict and for a new trial, both of which were denied. This appeal is brought on the theory that the verdict was against the manifest weight of the evidence.

The testimony on the part of the defendant was to the effect that he, desiring to purchase a 1953 2-door Ford automobile, asked a friend of his, one John Vandimere, to buy an automobile of that type for him, and paid him \$1,750 in cash. Vandimere then referred the defendant to a Mr. Gundberg, a fireman. The defendant contacted Gundberg at the firehouse. Gundberg at that time introduced him to Ike Goldstein, a salesman for the plaintiff, who was at the firehouse with Gundberg. Goldstein immediately told the defendant that he had a 4-door Ford for him. The defendant told him that when he gave John Vandimere his money he wanted a 2-door car. Goldstein then asked him to walk down to the showroom of plaintiff and look at the car, and defendant and a friend of his

MILWAUKEE TRADING COMPANY, INC.,
a corporation,
Appellant,
v.
FREDERICK VAN DERVOEGE,
Appellee.

MR. JUSTICE MASON DELIVERED THE

OPINION OF THE COURT.

A suit for conversion of an automobile was heard

before a jury, which found for the defendant. Motions

were made by the plaintiff for judgment notwithstanding

the verdict and for a new trial, both of which were

denied. This appeal is brought on the theory that the

verdict was against the weight of the evidence.

The testimony on the part of the defendant was

to the effect that he, having purchased a 1933 Ford

motor car, and a friend of his, one Van Dervoege,

came to him and offered to buy it for \$2,000.

Van Dervoege then offered the defendant

the car, which he, the defendant, accepted.

Van Dervoege then testified that the last

time he saw the car was when it was taken to the plaintiff,

who was then with the defendant.

Van Dervoege then testified that he had a 2-door Ford

motor car. The defendant told him that when he gave him

the car, he wanted a 2-door car. Goldstein

then asked him to walk down to the showroom of plaintiff

and look at the car, and defendant and a friend of his

accompanied Goldstein to the showroom and checked the car. Subsequently they returned to the firehouse with Goldstein, and the latter at that time asked Gundberg if he could get him a certain model secondhand Cadillac. Gundberg said he might get him some other model. Subsequently the defendant informed both Gundberg and Goldstein that he would take the car and Goldstein told him he would have the car ready the following Wednesday. On Wednesday, February 11th, the defendant telephoned Goldstein, and Goldstein told him the car was not ready, that he had a little matter to see Gundberg about and he would let defendant know. Goldstein on February 12th called the defendant at home and told the defendant's wife the car was ready and everything was clear, and for defendant to come and get the car the next day, February 13th. February 13th the defendant went to the office of the plaintiff and talked to Goldstein alone. Goldstein gave him an invoice for the automobile in question, which indicated that the total cash price of the car was \$2,330 and that the cash to be paid on delivery was \$2,330, and which invoice was stamped "Paid - Feb 13, 1953, Ritz Central Motors, Inc." Defendant also paid Goldstein \$12 for a title transfer and license, for which he was given a receipt. Defendant was then given by Goldstein an authorized Ford dealer's service policy and new car delivery record, and the car was delivered to him. There is testimony in the record on the part of the defendant that there was to be an additional charge for the automobile over and above

-3-

the \$1,750 which had been paid by the defendant to Vandimere.

In his testimony Goldstein denies that he met Gundberg and the defendant at the firehouse, and says that he had talked to the defendant over the telephone on or about February 5th or 6th and at that time the defendant had told him that he had placed an order with them for a car. Goldstein also testified that Gundberg had brought the defendant to the plaintiff's showroom; that he (Goldstein) had previously been acquainted with Gundberg, who had been at the salesroom of the plaintiff many times; that he had as many as 12 transactions with Gundberg regarding automobiles, none of which related to any cars except Fords, and he denied the conversation testified to by the defendant with reference to the Cadillac car.

Goldstein's testimony is that the car was delivered to the defendant February 10th. The plaintiff as a part of its case introduced a "Manufacturer's Statement of Origin" certifying that the car in question had been transferred to the plaintiff. Attached to this statement is a document by which the plaintiff assigns the automobile to the defendant, which is dated and notarized February 10, 1953. Goldstein's further testimony was to the effect that on the day when the car was delivered he, defendant and one Harold Friedman (also known as Harold Gable), who was the sales manager of the new car department, were present in the salesroom, and in this Goldstein is corroborated by the testimony of Friedman; that at that time Goldstein told the defendant he would have to

have money before he would let the car go; that the defendant replied that Gundberg had his money; that the defendant then called Gundberg on the telephone and he (Goldstein) went to the firehouse and was given a check by Gundberg dated February 14, 1953. Goldstein admits giving the defendant the papers which the latter claims he received. The plaintiff also claims that the defendant was given a copy of a receipt for \$2,330 describing the car and indicating a check number which corresponded to the number on Gundberg's check. Receipt of this document is denied by the defendant. Gundberg's check was returned by the bank marked "Not Sufficient Funds."

One Edward France, vice-president and general manager of plaintiff, testified that he did not know Gundberg and that "we never had 12 transactions with him regarding automobiles."

The evidence was in sharp conflict. The motion for judgment notwithstanding the verdict merits no consideration as there nowhere appears in the record a motion by the plaintiff at the close of all the evidence for a directed verdict. Since this was an action for conversion it is immaterial whether or not the car was paid for and it is not an issue in the present action. The only issue in this case is: What was the intention of the parties at the time the car was physically delivered to the defendant? Was it intended to be a cash on delivery sale, or was payment to be made subsequently? If the latter,

then there was no conversion,

The only agent of the plaintiff with whom the defendant dealt, according to his testimony, was Goldstein. (Mitchell v. McEwen Associates, 360 Ill. 278.) The plaintiff does not object to the instructions given to the jury by the court. The instructions do not appear in the record. We must assume that the jury were properly instructed as to the issues. The jury had the opportunity to hear and observe the witnesses in the trial of the case. If the jury believed, as they apparently did, the evidence of the defendant, it was sufficient to support their verdict. The burden was on the plaintiff to prove all the elements necessary to constitute a conversion. Burge v. Englewood M. C. and G. Co., 213 Ill. App. 357. In Avey v. Medaris, 272 Ill. App. 207, the court says:

"The court of review has no right to substitute its opinion for that of the jury in cases of this nature, so long as the verdict of the jury is supported by sufficient evidence. Where the testimony is hopelessly in conflict, the jury must believe one side of the case and disregard the other, in order to arrive at a verdict. Under such circumstances, the prevailing party is entitled to all the favorable inferences legitimately arising from the evidence and the verdict should remain undisturbed, unless it clearly appears that it was the result of passion or prejudice, or is contrary to the clear weight of the evidence."

See also Corcoran v. City of Chicago, 373 Ill. 567; City of Monticello v. LeCrone, 414 Ill. 550; Cooper v. Safeway Lines, Inc., 304 Ill. App. 302.

The verdict of the jury was not against the manifest weight of the evidence. The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Robson and Schwartz, JJ., concur.

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5 I.A.^{2d} 231

46364

CHICAGO GREAT WESTERN RAILWAY)	
COMPANY, a corporation,)	
)	Appellee,
)	
)	APPEAL FROM SUPERIOR
)	
v.)	COURT, COOK COUNTY.
)	
CHICAGO AURORA and ELGIN)	
RAILWAY COMPANY, a corpo-)	
ration,)	
)	Appellant.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Chicago Great Western Railway Company, a corporation, filed its complaint against the defendant, Chicago Aurora and Elgin Railway Company, a corporation, based upon a written contract dated November 24, 1930, between plaintiff, defendant and the Indiana Harbor Belt Railroad Company, hereinafter called Belt Company, for reimbursement of the cost of renewing a portion of a wooden trestle damaged by fire. The case was tried without a jury. The court found for the plaintiff and entered judgment for \$23,727.10, representing defendant's share of the cost of renewal. The court also found against the defendant on the latter's counterclaim for \$1,014.65 for damage occasioned by the spread of the fire to defendant's property. Defendant appeals from this judgment,

Defendant contends that the court erred in making its findings because the evidence conclusively showed that the fire damage resulted from plaintiff's sole negligence and under the terms of Paragraph 8 of the contract defendant

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is expressly exempted from making reimbursement for damage arising from plaintiff's sole negligence. To shorten our opinion and for the purpose of our decision we adopt defendant's construction of the contract that if plaintiff caused the damage to the trestle by its sole negligence it cannot recover.

The contract provides among other things for the separation of the grade tracks of the Belt Company from the grade tracks of the plaintiff and the defendant, and for the construction of an interchange and connecting tracks for the joint use of the three parties to the contract for the interchange of cars among them. As a part of this project under the contract a ramp and trestle were constructed leading from ground level to the overhead tracks of the Belt Company which were elevated to pass above the rights-of-way of plaintiff and defendant. The trestle was constructed upon plaintiff's right-of-way and became its sole property. Under the terms of the contract plaintiff was required to maintain and renew the trestle with the cost of maintenance and renewal to be shared by the three parties to the contract who use the trestle as a joint interchange facility. The contract in part also reads:

"SIXTH: The tracks, bridges, appurtenances and facilities constructed, reconstructed or changed as herein provided, shall be owned and maintained and the cost of maintenance shall be divided and borne as follows:

"* * *

"The trestle on the right-of-way of the Great Western Company shall be owned, maintained and renewed

by the Great Western Company and the cost of maintenance and renewal thereof shall be divided and borne equally between the parties hereto.

"The track on said trestle...shall be owned, maintained and renewed by the Great Western Company, and the cost of maintenance and renewal shall be divided equally between the Elgin Company and the Great Western Company.

"* * *

"EIGHTH: Each party hereto shall assume, bear and pay all loss and/or expense caused by reason of damage or injury or death either to its employes or to the employes of any other party or to other persons or damage or injury to property caused by its sole negligence or omission; in the event that death, damage or injury be sustained by persons or property of others be damaged through the joint or concurring negligence of two or more parties hereto, the parties at fault shall contribute in equal proportions; in the event that any party be required to pay compensation under the Workmen's Compensation Law and it is not at fault, the party at fault shall reimburse the other so required to make payment for all payments made, loss, cost and expense. If compensation be paid for injury or death under the provisions of the Workmen's Compensation Law, because of the joint and concurring fault or neglect of two or more parties, the parties at fault shall contribute equally thereto. If either party suffer damage to its property through the sole fault or neglect of any other, such other shall reimburse the party damaged or injured to the amount thereof, and if such damage be sustained through concurring negligence, the parties at fault shall contribute thereto equally. * * *

Some of the relevant facts pertinent to the issue of plaintiff's negligence are not disputed. The wooden trestle spanned a meandering north to south stream called Addison creek. The creek passed the Proviso Yard of the Chicago and North Western Railway Company. It then passed under plaintiff's main line bridge and under the wooden trestle which was a few feet south of its main line bridge. The trestle consisted of creosoted pilings, creosoted caps, creosoted stringers, creosoted plank, and stone ballast for

the track. About 125 feet south of the trestle the creek passed under defendant's concrete bridge. Plaintiff maintained a freight office in a building beside its eastbound main line track, a few hundred feet east of Addison creek. Plaintiff operated an eastbound train daily from Oelwein, Iowa, to Chicago, Illinois, known as No. 111, which arrived at the main line bridge over Addison creek near the interchange trestle at approximately 11:00 a.m. On March 11, 1949, this train arrived at the interchange at about 11:00 a.m. with orders to set cars out at this location. The train left about 11:30 a.m. At about 11:45 or 11:50 a.m. smoke and fire were seen coming up between plaintiff's main line bridge and the trestle.

Defendant contends that the manifest weight of the evidence conclusively showed that the fire resulted from plaintiff's sole negligence. It charges that the conditions permitted by plaintiff to exist at and near the trestle were such as to virtually invite a fire. With the creosoted trestle presenting an obvious fire hazard, plaintiff failed to take the simplest precautions against fire. It permitted its train crews to smoke while working near the trestle. It permitted fusees to be tossed away indiscriminately while still burning. It failed to instruct its employees on how to extinguish fusees. It permitted dead timber to accumulate on its right-of-way. It permitted grease, oil and other debris to accumulate on the bank of the creek directly under the main line bridge and adjoining trestle.

At the time of the seizure of the property, the property was in the possession of the defendant, who was then in the possession of the property. The property was then in the possession of the defendant, who was then in the possession of the property.

This was received at the telephone room at about 11:00 a.m.,

change records accordingly 11:07 a.m. On March 11, 1960,

March 11, 1960 11:07 a.m.

with others to get away out of the building. The train
left about 11:30 a.m. At about 1:30 or 1:40 a.m. smoke
and fire were seen coming out of the building. The train
bridge and the bridge.

and to advise whether and for what reasons technical
information should be withheld from the public.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

and no connection with the fact that the defendant is a member of the same family as the person who was killed.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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These charges presented at least three issues of fact which are disputed. The first is whether one or more of plaintiff's employees started the fire either by discarding a lighted fusee, or a lighted cigarette or match. Plaintiff's employee, Ramsey, head brakeman on its train No. 111 when it came in at the time in question, alighted from the train about 100 feet east of the creek and ignited a fusee. He testified that he was not sure whether he used more than one fusee but said, "I don't think I did." He got back on the south side of the train when it started to move back westward with the fusee in his hand and disposed of it at a point about 900-1000 feet west of the creek. A lighted fusee will burn for ten minutes. It flares and sputters off burning particles. Plaintiff used fusees as signal flares. Defendant's safety engineer testified that defendant used them as warning flares only. Plaintiff's men smoked while on duty. Ramsey smoked about two packages of cigarettes a day. After the cars were dropped off Ramsey rode with the engineer and fireman. They approached the creek and did not see any fire or smoke. Train No. 111 left about 11:30 a.m. eastbound. No westbound trains arrived at the interchange between 11:00 and 12:00 noon. James Doumis, at one time plaintiff's section foreman, lived in a box car nearby, and shortly after train No. 111 had passed, crossed over the main line bridge parallel to the trestle. He saw no fire, smoke or flames under the bridge or trestle. Only a few minutes before the fire was

discovered an engine of the Belt Company had picked up a string of cars and had gone over the trestle. William Wadlington, defendant's tower man since 1945, worked at the Bellwood avenue tower between defendant's and plaintiff's tracks and testified that plaintiff's crewmen consistently tossed their fusees, still burning, up in the air after they had stopped using them. About 11:45 or 11:50 Mr. Blucker, plaintiff's clerk, looked out of the "bay" window in the tower where he worked and saw plaintiff's train No. 52 approaching from the west about two miles away. At the same time he saw smoke coming up between the main line bridge and trestle. He then called the Bellwood fire department.

Defendant observed plaintiff's consistent use of fusees as signal flares at the interchange facilities since as early as 1945. There had been no previous fire. The design and construction of the original trestle were approved by the defendant. The trestle was regularly inspected by plaintiff's and defendant's engineers. At no time did defendant contend that it was a fire hazard. The only statement we have in the record that it was a fire hazard was made by defendant's engineer who had inspected and approved the bridge and who said at the trial that "creosote is a form of oil. When the heat of the fire would hit the creosoted wood, it would cause the creosote to burn." From this it would be difficult to infer that it burns more readily and rapidly than wood or other

along the south side of the main line bridge and the west bank of the creek under the trestle. On this point there is also a sharp conflict in the evidence. Defendant's section foreman, Ed Hart, testified that in the summer and autumn, 1948, and again as late as March 8, 1949, three days before the fire, he saw old lumber beside the main line bridge, on its south side, and on the west bank of Addison creek under the trestle. He said that he made daily inspections of defendant's tracks, etc., about 120 feet south of the trestle and plaintiff's main line bridge. S. J. Steiner, defendant's assistant engineer, construction and maintenance, testified that during an inspection of the trestle on January 5, 1949, together with plaintiff's and the Belt Company's engineers, he saw old timber along the south side of the main line bridge and on the west bank of Addison creek under the trestle.

Against the testimony of defendant's two employees, plaintiff introduced the contrary testimony of two of its employees. The first, W. O. Rutherford, plaintiff's division engineer, testified that in October, 1948, and twice in January, 1949, one of the latter occasions being his inspection tour with the engineers of the other lines, he saw no old lumber around the main line bridge or trestle; on the contrary, the area was clean. Doumis, plaintiff's flagman, corroborated Rutherford's testimony. He testified that he as section foreman in October, 1948, and a gang of eight men under him, cleaned up under the trestle and main line

The following is a list of the names of the persons who have been identified as having been in contact with the subject, in the order in which they were identified:

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bridge. He also testified that plaintiff's section boss cleaned up the area again in March, 1949.

The third disputed issue of fact is whether as defendant charges, plaintiff permitted "grease, oil and other debris" to accumulate on the creek's bank near the trestle's creosoted wooden pilings. It is undisputed that the fire originated on the west bank of the creek under the south edge of the main line bridge, a few feet north of the trestle's creosoted pilings. Defendant introduced in evidence a letter written by plaintiff's vice-president, now deceased, and addressed to the Chicago & North Western Railway Company, copies of which were sent to defendant and the Belt Company.

"Messrs:

J. E. Goodwin, Vice President and Exec. Asst. to President
C. H. Longman, Vice President--Operation
Chicago & North Western Railway Company
400 W. Madison Street
Chicago, Illinois.

Gentlemen:

On March 11, 1949, our trestle over Addison Creek at Bellwood, Illinois, was severely damaged by fire. Our investigation discloses that the fire was originally started in grease and oil in and along the banks of the creek. The investigation further discloses that for some time past you have caused grease, oil and other debris to be dumped into the creek as it passed by your Proviso Yard.

You are hereby requested to cease and desist your past practice of dumping or emptying any debris, oil, grease or other foreign matter into Addison Creek.

You are further notified that we shall look to your company for reimbursement of the cost for repairing the damage done to our trestle on March 11, 1949, and for any other damage done to our trestle or other property because of the continued existence of the nuisance created by you in Addison Creek.

bridge. He also testified that plaintiff's section boss
cleaned up the area again in March, 1949.

The third disputed issue of fact is whether or
defendant charges, plaintiff permitted "grease, oil and
other debris" to accumulate on the creek's bank near the
plaintiff's cross-tied wooden pilings. It is undisputed that
the line out, located on the west bank of the creek below
the north end of the main line bridge, a few feet north
of the plaintiff's cross-tied pilings. Defendant introduced
in evidence a letter written by plaintiff's vice-president,
now deceased, and addressed to the Chicago & North Western
Railway Company, dated at which time was sent to defendant
and the Bell Company.

"Witness:
J. H. Nichols, Vice President and Exec. Asst. to President
of Chicago & North Western Railway Company
400 W. Madison Street
Chicago, Illinois
Gentlemen:

In March 11, 1949, our train ran over Addison Creek
at Bellwood, Illinois, we heavily damaged by fire. Our
investigation of the fire and the fire was originally
started in the area of the fire; the banks of the
creek. The investigation of the fire showed that for
some time past you have been pouring, oil and other
debris to be dumped into the creek as it passed by your
Property Yard.

You are hereby requested to cease and desist your
past practice of dumping or pouring any debris, oil,
grease or other material into Addison Creek.

You are further notified that we shall look to
your company for reimbursement of the cost for repairing
the damage done to our tracks on March 11, 1949, and
for any other damage done to our tracks or other property
because of the continued existence of the nuisance
created by you in Addison Creek.

I trust that upon receipt of this notice the nuisance created by you will be discontinued.

Yours very truly,

/s/ S. M. Golden

cc: Messrs.

F. H. Simpson, Engineer Maint. of Way, New York
Central System, Chicago.
P. R. Elfstrom, Vice President & Gen. Mgr. Chicago
Aurora & Elgin Ry. Co.
R. H. McGraw, General Mgr., Indiana Harbor Belt
R.R., Gibson, Ind."

On reading just the letter it would seem that this is a damaging admission against interest of plaintiff. Mr. Golden died before the trial. The testimony of the witnesses raised a grave doubt as to his personal knowledge of the facts alleged in his letter.

Byron L. Johnson, Chief Special agent in charge of plaintiff's police department, testified that he investigated the fire of March 11, 1949; that at the request of plaintiff's attorneys he took a sample of the creek water "maybe a couple of hundred yards north of the bridge," and sent it to the company's chemist from whom he received a report or analysis in writing which, as best he could recall, analyzed the sample as "oil, emulsified water,...the margin point of it was very low," i.e., the igniting point was very low. This report was forwarded to the plaintiff's attorneys and to Mr. Golden. He testified that he at no time talked with Golden about this matter, but did talk with plaintiff's attorneys.

W. O. Rutherford, plaintiff's engineer, testified

line] bridge were creosoted timber...."

Only one witness, defendant's, testified that after the fire he saw oil lodged in little blocks along the side of the creek. No witness testified that he saw "oil, grease and debris" lodged along the sides of the creek or accumulated under the main line bridge or trestle. The witness who testified that he saw oil lodged in little blocks along the banks of the creek did not point to its precise place, give its general extent or other characteristics. No one testified that oil was lodged in little blocks along the sides of the creek before the fire. Rutherford testified that he could not recall ever having discussed the results of Mr. Byron Johnson's investigation with the latter after the fire. He didn't know that Mr. Johnson had made an investigation. He had not been asked to make and did not make any report to Mr. Golden about the conditions under the trestle and bridge at the time of the investigation of the fire and could not recall ever having had a discussion about it with Mr. Golden or plaintiff's attorneys at the time. Nothing in the record shows how Golden got his information. The letter must be viewed within the context of all the evidence and accorded its relative weight. That weight is for the trier of fact. Frizell v. Cole, 29 Ill. 465; Reed v. Kabureck, 229 Ill. App. 36.

Examining the record as we have, it is apparent that there were sharp conflicts in the evidence and testimony as to the questions of fact. The question of negligence itself

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any and all of its subsidiaries, agents or employees

The time he saw all lodged in little blocks along the side of the creek. No witness recalled that he saw "oil, grease and kerosene" lodged along the sides of the creek or surrounding

under the said line bridge or trestle. The witness who testified that he saw all bodies in these places along the banks of the creek did not bring to its preceding place, five or several hundred or other observations. No one testified

could not make contact at any of the following:

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856 III. Abb. 10.

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There were three confederates in the room, and they were all dressed in civilian clothes.

as you have not been able to find any other information about the person who was the subject of the above information.

can be a question of fact. Russell v. Richardson, 302 Ill. App. 589. Even where the facts are admitted, but where a difference of opinion as to the inferences that may legitimately be drawn from them exists, the question of negligence is one of fact. Denny v. Goldblatt Bros., Inc., 298 Ill. App. 325, 333. On review, a finding of the trial court is given the same weight or force and effect as a jury verdict. 2 Ill. Law and Practice, sec. 786, p. 754. Hence, findings of a court sitting without a jury as to issues of negligence will ordinarily be treated the same as any other fact and will not be disturbed unless against the manifest weight of the evidence. Darling & Co. v. Yellow Cab Co., 238 Ill. App. 326, 329; Bird v. Louer, 272 Ill. App. 522, 526; Reese v. Laymon, 2 Ill. 2d 614, 624.

From a consideration of all the evidence we conclude that the findings of the trial which saw and heard the witnesses are not against the manifest weight of the evidence.

There is finally a question between the parties as to which of them should carry the burden of proof on the issues of negligence in this case. The trial court insisted that plaintiff include in its complaint an allegation of due care, sustained defendant's motion to dismiss the original complaint and permitted plaintiff to amend its complaint to include the allegation. In its answer defendant denied the allegation and affirmatively

-14-

pleaded plaintiff's sole negligence as a bar to the action. Because of the sharp conflict in the evidence adduced on the issues in this case we do not consider the question material.

The judgment of the trial court is affirmed.

Judgment affirmed.

McCormick, P. J., concurs.

Schwartz, J., took no part.

placed plaintiff's sole negligence as a bar to the action. Because of the sharp conflict in the evidence adduced on the issues in this case we do not consider the verdict rational.

The judgment of the trial court is affirmed.

Judgment affirmed.

McDonnell, J., concurs.

Schwartz, J., took no part.

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5 I.A.^{2d} 232

46411

JACK SOMMERS and)	
WILLIAM P. KELLY,)	
Appellees,)	APPEAL FROM MUNICIPAL
)	
v.)	COURT OF CHICAGO.
)	
JAY E. BURNS,)	
Appellant.)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court of Chicago upon a verdict by a jury in favor of plaintiffs Jack Sommers and William P. Kelly, and against defendant Jay E. Burns. This was a consolidation of two causes of action involving plaintiffs' claim for rent under a lease which plaintiffs, as lessees, had assigned to the defendant. The first claim was for rent due for a part of February and the months of March and April, 1952, in the sum of \$815, and the second asked for an additional \$1,400 for rents for the months of May, June, July and August, 1952, making a total of \$2,215. The jury brought in a verdict in favor of plaintiffs and against defendant in the sum of \$1,007.50.

Defendant does not deny that he did not pay the rent for the months in question. He asserts two defenses which he contends bar plaintiffs' cause of action. First, that simultaneously with the execution of the assignment of the lease in question there was an agreement between plaintiffs and defendant whereby the defendant was to purchase from the plaintiffs certain equipment at a

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fixed price. This equipment was to be used in the business to be conducted on the premises and without it defendant could not operate. He states that after the execution of the assignment of the lease the plaintiffs refused to turn over the equipment at the price stated and increased their price. Second, the plaintiffs forcibly barred the defendant from entering, occupying and taking possession of the premises,

Defendant contends that the judgment should have been either for the full amount for which plaintiffs sued or for the defendant and that therefore the verdict was a compromise and should not be allowed to stand in the trial court.

The only portions of the record that this court has before it are the pleadings in the trial court. The evidence was not made a part of the record. It is, therefore, impossible for us to ascertain whether or not there is any basis for plaintiffs' contention. The presumption is that the evidence was sufficient to sustain the findings and the judgment of the court. Addante v. Pompilio, 303 Ill. App. 172; Fortier v. Fortier, 320 Ill. App. 626.

The record does not reveal any cross-appeal filed by plaintiffs objecting to the amount of the judgment. It is the law in this State that if the jury gives a plaintiff less than he is entitled to recover upon a finding of the issues, the error is one of which plaintiff alone can complain. In fact, the cases cited by defendant to support

-3-

his contention are cases where the plaintiff appealed because the verdict was smaller than his claim. These therefore have no application to defendant's contention. If plaintiff submits to the verdict, defendant cannot be heard to insist that it shall be set aside because it is unjust to plaintiff. Heyman v. Heyman, 210 Ill. 524, 540; Hunter v. Winter, 268 Ill. App. 487; Wright v. Stinger, 269 Ill. App. 224.

It is urged by plaintiffs that this appeal is vexatious and within the intendment of the statute authorizing the addition of ten per cent to the amount of the judgment, if the court is of the opinion that the appeal has been prosecuted for delay, Ill. Rev. Stat. 1953, ch. 33, par. 23. We are at all times reluctant to discourage appeals but when they are taken for vexatious purposes a penalty should be assessed. We are of the opinion in the instant case that there was no merit in defendant's contentions and it is apparent that the appeal was vexatious. Koelling v. Wachsnig, 174 Ill. App. 321. We, therefore, conclude that plaintiffs are entitled to have the penalty of ten per cent of the amount of the judgment assessed as provided by statute.

The judgment below for \$1,007.50 will be affirmed and \$100.75, being ten per cent thereof, will be added to said judgment for vexatious delay.

Judgment affirmed with damages
for delay.

McCormick, P. J., and Schwartz, J., concur.

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ARTHUR L. ISRAEL, Plaintiff,

v.

MORRIS B. HART et al.,
Defendants.

MORRIS B. HART,
Counterclaimant,
Appellant,

v.

SAM HART,
Counterdefendant,
Appellee.

15 I.A.^{2d} 223

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an action brought by plaintiff Arthur L. Israel, an attorney, to compel defendant Morris B. Hart to execute a release because of having obtained from plaintiff \$2,300 therefor; or in the alternative, for a decree finding that defendant had, by accepting the payment, discharged his father Sam Hart, plaintiff's client, from all claims that he might have against his father. Defendant filed a counterclaim in which he joined his father as counterdefendant and sought the court's aid in adjudicating his claimed rights, as owner, to a certain retail paint store operated by his father, and to recover certain monies entrusted to his father. The court referred the cause to a master in chancery for hearing, who found that the plaintiff was entitled to no relief, denied defendant's relief on the counterclaim and found for the counterdefendant Sam Hart. The trial court approved the report of the master and dis-

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1. *Phragmites* (common)

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1010 UV-Visible Spectrophotometer. The concentration of chlorophyll was expressed in $\mu\text{g mL}^{-1}$.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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missed the counterclaim for want of equity. Counterclaimant Morris B. Hart appeals from that portion of the decree dismissing the counterclaim.

The principal contention of Morris Hart is that the court's findings and decree are against the manifest weight of the evidence. Over 2700 pages of testimony were taken before the master.

A brief summary of the essential facts from the record relating to the background of the case is that in 1910 Sam Hart, an immigrant from Lithuania, landed at Baltimore, Maryland. He had left behind him his wife, their infant son Morris, and a daughter Ida. His assets consisted of twenty-five American dollars. He lived in various eastern states before coming to Chicago in 1912. He engaged in varied occupations from which his earnings were meager. In Chicago he lived for a time with his wife's brother Morris Horwitz, who was a painting contractor and owner of a paint store. He gave Sam employment first at \$5 and then at \$9 a week. Thereafter, for a period of time he worked at various odd jobs. In 1921 he again started working for Horwitz as a painter. In that year his wife, Mary Hart, and children, Morris and Ida, migrated to this country. Money was sent from here to pay their expenses for the trip. While waiting to come to this country Mary worked in a bakery business with her parents in Lithuania. The Russian revolution made refugees of her and the children. For a time Sam could not make contact

with them. The Hart family were reunited in Chicago and lived in the Horwitz apartment. Later they moved to their own abode. Sam continued to work as a painter for Horwitz and other contractors. In 1927 the Hart Wallpaper and Paint Company, not incorporated, a retail paint and wallpaper business, was established by the Harts. At first Mary worked alone in the store during the day and Sam Hart worked as a painter and decorator for other contractors. Mary Hart was assisted by her son Morris Hart after school. About 1937 Sam was able to abandon his outside work and devote full time to the business. In the early part of 1930 Morris started working full time in the business. Disputes arose between Morris and Sam. Mary died in February, 1945. In July, 1945, Sam remarried. This, apparently, precipitated the difficulties between Sam and Morris and brought about the dispute as to the ownership of the business.

The burden of proving his ownership of the business was on Morris Hart. He claimed that his mother, Mary, furnished the money to start the business from certain funds that she is supposed to have brought to this country from Lithuania and money that she found in a store in Chicago. He claimed that she was in reality the owner of the business although it was operated in Sam's name. He claims that the mother through certain acts had turned the business over to him. The testimony of 23 witnesses was heard in support of Morris's claim. Documentary evidence

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 has decided to increase the
 discount rate from 3 to 4 per cent.

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was introduced to support it. One exhibit was a partnership agreement entered into on January 25, 1939, between Morris Hart and his mother under which they were to share the profits of the Hart Wallpaper and Paint Company.

Sam's contention is that he was at all times the owner of the business; that he established it from money he had saved. The testimony of 20 witnesses was heard in support of his defense.

The master who heard and saw the witnesses, made certain findings from the documents introduced by Sam Hart. These in substance are:

1. The original lease for the premises where the business was conducted and all leasing since then has been in the name of Sam Hart, all leases being signed by him.

2. A bank account for the business was opened in 1927 with the Lawndale National Bank in the name of Sam Hart and he has since been the sole signatory of the account at all times with the exception that he at one time authorized the bank to honor checks bearing certain numbers upon the signature of Morris Hart at a date prior to the year 1939.

3. The returns made to the State of Illinois concerning retailer's occupational tax on account of the business were made in the name of Sam or Samuel Hart, and applications to the Office of Price Administration were made in the name of S. Hart as owner.

4. Such income tax returns as were prepared were by an accountant in the name of Sam Hart doing business as the Hart Wallpaper & Paint Company, and these returns were signed by Sam Hart.

5. Account books were kept for the business and showed a capital account in the name of Sam Hart.

6. In 1938 Morris Hart sued Sam Hart for wages for work done by Morris Hart in the business, and recovered a judgment by default against Sam Hart for \$4,400. The judgment was later settled for \$2,800 and payment to Morris Hart was made by check drawn in the business bank account and signed by Sam Hart.

7. On July 6, 1938, Morris Hart made a written agreement with Sam Hart settling a pending law suit brought by the son against the father, agreeing on a weekly salary for the son for his services plus one-third of the net proceeds (with a minimum of \$1,500) of the business if "sold by said Samuel Hart," the sale price to be determined solely by Samuel Hart.

8. On January 26, 1939, Morris Hart made an agreement with Sam Hart in which it is recited that Sam Hart "is engaged in business under the name of Hart Wallpaper and Paint Company" and in which Morris Hart released the agreement of July 6, 1938, agreed to release the judgment above mentioned and agreed not to interfere with the operation of the business by Sam Hart or to solicit the customers of the business or compete with the business, agreed to deliver any records of the business he might have, agreed not to use certain names, set forth, in any business. (It will be noted that this is one day after the partnership agreement that Morris claims he and his mother entered into.)

9. Morris Hart was appointed administrator with will annexed of his mother's estate by the Probate court of Cook County. The inventory of the estate and the inheritance tax return filed with the State of Illinois disclosed no interest in the business as an asset.

This documentary evidence in view of the contentions made by Morris Hart must be given strong probative value in support of Sam Hart's defense. It is particularly clear that Items 6, 7 and 8 were admissions against interest deliberately and not casually made by Morris Hart who had knowledge of all the facts. Under such circumstances these admissions are convincing evidence against his claim. Frizell v. Cole, 29 Ill. 465, 466.

The record disclosed that there are many inconsistencies in Morris Hart's testimony, in his sister Ida's and in the testimony of the various witnesses who testified in his support. There are also many inconsistencies in Sam Hart's testimony and in the testimony of the witnesses who testified in his support. The master had the opportunity to judge the

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candor and the actions of all the witnesses. The voluminous record is replete with testimony showing the bitterness of this family quarrel. We are of the opinion after an examination of the record and the report of the master that he was amply justified in finding that Morris Hart failed to meet the burden of establishing that the business was started by his mother from her own separate property, and that he failed to meet the burden of overcoming the presumption that the business acquired during coverture was the property of the husband Sam Hart.

It is well-established that where the findings of the master have been confirmed by the court, such findings will not be disturbed unless manifestly against the weight of the evidence. Wurth v. Hosmann, 410 Ill. 567; Zeta Bldg. Corp. v. Garst, 408 Ill. 519; Schmalzer v. Jamnik, 407 Ill. 236; Chambers v. Appel, 392 Ill. 294; Miller v. Rich, 147 Ill. App. 65. We, therefore, conclude that the findings and conclusions of the master approved by the chancellor are not against the manifest weight of the evidence.

Morris Hart makes a further contention that the charges of the master are excessive. The total fees were \$3,572. The trial court ordered Morris Hart to pay one-half of the fees and Sam Hart to pay one-half. We have examined the schedule set up by the master in his report and we conclude that his fees are not excessive.

The decree of the trial court is affirmed.
Decree affirmed.
McCormick, P. J., and Schwartz, J., concur.

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Agenda No. 29

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State	Size	Cost
Alabama	50,000	\$100,000
Alaska	100,000	\$200,000
Arizona	150,000	\$300,000
Arkansas	200,000	\$400,000
California	250,000	\$500,000
Colorado	300,000	\$600,000
Connecticut	350,000	\$700,000
Delaware	400,000	\$800,000
Florida	450,000	\$900,000
Georgia	500,000	\$1,000,000
Hawaii	550,000	\$1,100,000
Idaho	600,000	\$1,200,000
Illinois	650,000	\$1,300,000
Indiana	700,000	\$1,400,000
Iowa	750,000	\$1,500,000
Kansas	800,000	\$1,600,000
Kentucky	850,000	\$1,700,000
Louisiana	900,000	\$1,800,000
Maine	950,000	\$1,900,000
Maryland	1,000,000	\$2,000,000
Massachusetts	1,050,000	\$2,100,000
Michigan	1,100,000	\$2,200,000
Minnesota	1,150,000	\$2,300,000
Mississippi	1,200,000	\$2,400,000
Missouri	1,250,000	\$2,500,000
Montana	1,300,000	\$2,600,000
Nebraska	1,350,000	\$2,700,000
Nevada	1,400,000	\$2,800,000
New Hampshire	1,450,000	\$2,900,000
New Jersey	1,500,000	\$3,000,000
New Mexico	1,550,000	\$3,100,000
New York	1,600,000	\$3,200,000
North Carolina	1,650,000	\$3,300,000
North Dakota	1,700,000	\$3,400,000
Ohio	1,750,000	\$3,500,000
Oklahoma	1,800,000	\$3,600,000
Oregon	1,850,000	\$3,700,000
Pennsylvania	1,900,000	\$3,800,000
Rhode Island	1,950,000	\$3,900,000
South Carolina	2,000,000	\$4,000,000
South Dakota	2,050,000	\$4,100,000
Tennessee	2,100,000	\$4,200,000
Texas	2,150,000	\$4,300,000
Utah	2,200,000	\$4,400,000
Vermont	2,250,000	\$4,500,000
Virginia	2,300,000	\$4,600,000
Washington	2,350,000	\$4,700,000
West Virginia	2,400,000	\$4,800,000
Wisconsin	2,450,000	\$4,900,000
Wyoming	2,500,000	\$5,000,000

Appeal from the
Circuit Court of
Winnebago County.

This is an action brought to recover damages under the Dram Shop Act for personal injuries which the plaintiff received on September 20, 1952. The complaint consisted of three counts, and the defendants were James Dilonardo, Louis A. Dilonardo, Abe H. Rosenbloom, and Virginia Rosenbloom. The Dilonardos operated a tavern known as the Forest City Tavern on Seventh Street in the City of Rockford, the building being owned by the Rosenblooms. No service was had on James Dilonardo and a severance was granted, and the issues made by count one of the complaint and the answer thereto by Louis A. Dilonardo and the Rosenblooms were submitted to a jury and are the only ones involved in this appeal.

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Abstract

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At the close of all the evidence, the court reserved its ruling upon the motion of the defendants for an instructed verdict. The jury, being unable to agree upon a verdict, were discharged, and subsequently the court granted defendants' motion and rendered an appropriate judgment in bar of plaintiff's action as charged in count one, and the record is before this court upon an appeal by the plaintiff.

Counsel agree that the only question for determination by this court upon this record is whether or not the plaintiff proved a material averment of his complaint to the effect that upon the occasion when plaintiff was injured he was not intoxicated or under the influence of alcoholic liquor and in no way contributed to his own injury. Counsel for appellee insists that the evidence wholly fails to sustain this allegation of his complaint and, therefore the trial court was warranted in rendering the judgment it did. Counsel for appellant argue that upon a motion for a directed verdict, the court can only determine whether or not there was any evidence which, with all reasonable inferences arising therefrom, viewed in the light most favorable to the plaintiff, tended to prove the material allegations of the complaint; that the court cannot weigh the evidence, and all contradictory evidence or circumstances must be rejected, and it is only when there is a total failure to prove a necessary element of a case that the court is warranted in directing a verdict.

The evidence discloses that the plaintiff, an unmarried man, forty-six years of age, occupies an apartment where he does his own housekeeping, and was employed by the Rockford Forging Die and Tool Company. On the morning of September 20, 1952, he arose about nine o'clock and left his apartment, returning about

an hour later. He then went to a lumber yard for some paint, and on his way back he stopped at a tavern and had two drinks of whiskey and two drinks of beer with a friend. He then returned to his apartment, arriving about noon, had his noon meal, cleaned up his apartment, and left about three o'clock in the afternoon to get a hair cut, and when he left the barber shop he went to defendant's tavern, arriving there, according to his testimony, at 5:10 p.m. Defendant Dilonardo was tending bar, and plaintiff ordered and drank two glasses of beer. Nellie Touafar, whom plaintiff testified he did not know, was in the tavern and seated near the middle of the bar, and plaintiff was close to the end of the bar, eighteen or nineteen feet east of where Nellie Touafar was sitting. Six or seven other people were at the bar, and plaintiff asked the bartender to ask Mrs. Touafar if she would have a drink at his expense. The bartender did so and came back to plaintiff with her answer that she would, and plaintiff bought her two drinks. Plaintiff testified that he then started to leave the tavern and passed to the rear of Mrs. Touafar who was seated on a stool facing the bar; that as he did so, Don Johnson pushed him in the mouth, and he went down to the floor in a sitting position but wasn't injured. The plaintiff testified that at the time this happened he didn't know who it was that pushed him but that he now knows it was Don Johnson. He stated that Johnson had no ill feeling toward him that he knew of and that he had had no conversation with Johnson in the tavern that day; that he didn't say anything to Johnson after he tripped him but arose and walked out of the tavern because he didn't want to start any trouble. From the defendant's Frank's Tavern and met a man he
tavern plaintiff testified that he walked a block and entered /

had known for a long time and treated him to a couple of drinks but didn't remember whether he had a glass of beer there or not but knew he had a 7-Up. Plaintiff "guessed" he must have been in Frank's Tavern a couple of hours and he then returned to defendant's tavern and while standing at the bar waiting to be served, someone hit him on the leg and he fell down. The plaintiff then continued: "I don't know what hit me on the leg. I was sober at the time. I thought it was between 6:30 and 7:00 at the time. I found out since that it was between 7:30 and 8:00. I felt my drinks but was not intoxicated. I thought my leg was broken. After I fell Ed Dehn picked me up. They half carried me out and left me on the sidewalk. The ambulance came and took me to the hospital." Examination then disclosed plaintiff had a Potts dislocation of the ankle, which consists of a fracture of both bones of the ankle joint with a dislocation of the foot. Plaintiff suffered a permanent injury to his leg, was unable to work for fourteen weeks, and his hospital and medical bills amounted to \$708.00.

Donald Johnson testified that he was in defendant's tavern upon the occasion in question and had been there an hour and a half before he observed the plaintiff; that he (Johnson) was sitting beside Mrs. Touafar on a bar stool when Plaintiff came up and called Mrs. Touafar a whore. As abstracted, this witness then testified: "I told him (plaintiff) to apologize to her and he said: 'Apologize to that whore?' I was sitting on a stool and pushed him and he fell down. He got up and went out the front door under his own power. I had been drinking

with Mrs. Touafar for about half an hour." This witness then testified that later the plaintiff returned to the defendant's tavern; that Mrs. Touafar had been at the bar all the time plaintiff had been gone; that he, Johnson, bought her a highball; that Mrs. Touafar didn't see plaintiff until he stood beside her, and that Mrs. Touafar then said to the plaintiff that she wanted an apology from him, but he wouldn't apologize so she slapped him; that plaintiff did not fall down but was drunk and another fellow, whom the witness thought was Mrs. Touafar's husband, and the witness got the plaintiff by the arm and told him to leave and come back when he was sober and escorted him to the front door and put him out but didn't shove him, and witness didn't know that plaintiff had broken his leg or was afterwards taken away in a police ambulance.

As a witness called by the plaintiff, Mrs. Nellie Touafar testified that she was in the Forest City Tavern on September 20, 1952, and was sitting at the bar drinking either Pabst or whiskey sour and had been there about an hour and a half with a drink in front of her all the time she was there; that plaintiff was there, and she slapped him. On cross-examination, she testified she was not drunk at the time she slapped plaintiff. When called as a witness for the defendants, this witness testified, as abstracted by counsel for appellant: "I live a block north of Forest City Tavern. I am a waitress. On September 20th, 1952, I came into the Forest City Tavern about 7:00 or 7:30 when I got through work. I did see Mr. Swan in the Forest City Tavern at that time. I didn't pay much attention to him at the time, but I got to know him before it was all over. Swan had been fooling around at all parts of the bar and then he came down where

a bunch of us kids were talking and then he started smarting off at me. In the first place, he wanted to buy me a drink. I didn't accept it when we were all sitting talking. Then he started calling me names. He called me an old whore. The fellows, Donnie Johnson and Donnie Nell, were standing up behind me. They got mad because he called me that in Swedish. Donnie Johnson understands Swedish. I asked him what Swan had said. The boys didn't tell me at first and after Swan had left, the boys then told me that he called me an old whore. That is how I found out. I was in the Forest City Tavern after 3:00 when I got off my first shift. That is the first time I was in the tavern that day. Mr. Swan was in there. He asked Louie if he could buy me a drink. Louie came down and asked me. I was sitting at the further end of the bar with a woman. I accepted so I had a drink. I drank it. I did not say anything to Mr. Swan at that time. That is all that occurred that afternoon. I went home, prepared supper and went back to work again. There wasn't any tussle in the tavern in the afternoon. After supper I came back to the tavern. It was about 7:00 or 7:30 after I got through work. Mr. Swan was in the tavern when I came in. He was seated at the bar. Swan might have started to talk to Donnie Nell and Donnie Johnson back of me. I didn't understand what Mr. Swan said until later. One of the fellows took a poke at him. Swan went out and came back. Then I asked him what he said. I said, 'Would you mind repeating what you said in Swedish in English?' He said, 'No.' He told me the same thing in English and I slapped him. I don't honestly know which one of the men struck him. Mr. Swan walked out of

the tavern under his own power. Eddy took his arm and said, 'I think it is about time to go,' so he took his arm and led him to the front door. I didn't see Mr. Swan down on the floor at any time. He didn't go on the floor. I slapped him with an open hand once. He said nothing to me after I slapped him. I didn't threaten to kill him at that time. I didn't say anything like that." Upon cross-examination, this witness further testified: "It was between 3:00 and 4:00 when I came to the Forest City Tavern the first time on September 20, 1952. On account of the fact there was a fair or carnival on Seventh St., instead of stopping work at 3:00, I worked from 5:00 until 7:00. I worked from 7:00 until 3:00 at the restaurant. Then I was off from 3:00 to 5:00. Then I worked a couple of hours after that. I came in at 5:00 and stayed a couple of hours. I went to the tavern first between 3:00 and 4:00. I had two drinks and I left there. I bought myself a drink when I came in. Someone asked me if I would take a drink and I had one more. I went home, had supper, got the family set before I went back to work at 5:00. After I left the tavern the first time I went to do my grocery shopping and then to my apartment. The first time I went in, my husband was not with me. . . . The statements that Swan made to me in Swedish were made when I came back in the evening. That was after I finished work for the last time. I don't remember what time he made the statement. I would say about an hour or an hour and a half, 7:00 or 7:30 in the evening. I don't remember if I ran home and changed clothes and went down there or went right from the restaurant. I don't ^{know} if I was cleaned up when I went back to work. I had my uniform on. I don't understand Swedish. Some people said Donnie Johnson struck

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AND STATIONERS, IN ST. PAULS CHURCH-YARD, IN LONDON.
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DOOR OF THE HOUSE OF COMMONS, IN PARLIAMENT ASSEMBLED.
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Swan and knocked him down, but I don't know. I was right near Swan and Bonnie Johnson. Mr. Swan left the tavern at that time. He came back about half an hour or an hour. I can't judge the time. I then went up to him and asked him if he said that. He was standing there and I asked him. I had been drinking at the time. I said I had 3 or 4 whiskey sours or Pabst. That is what I was drinking at the time. I don't know which I was drinking because I change quite a bit. I walked up to Swan and asked him if he would repeat in English what he said in Swedish. He did, and I slapped him. He didn't fall down. He didn't stumble backwards. I don't know what he did. I don't remember whether he staggered. He didn't go down at all. Then Mr. Dehn took him out. That is the last I saw of him. I would say it happened about 8:30 or 9:00, an hour or an hour and a half after I got there."

Anna White testified that she was slightly acquainted with plaintiff, and upon the evening in question she and her husband were at the Forest City Tavern; that she saw Nellie Touafar there and that she and two men were arguing with the plaintiff and witness heard Nellie say "I am going to kill you"; that she turned around and saw plaintiff lying flat on the floor. This witness then continued: "I did not see anybody strike him. I only heard her say she was going to kill him. I had watched her this particular evening. She was pretty drunk." Upon cross-examination, she testified that all the people who were there seemed to be drunk but that she didn't see the plaintiff until he was lying down so "I can't tell you if he was drunk ahead of time or not."

According to the testimony of Slim Vance, who was in the tavern at the time, Nellie Touafar shoved the plaintiff as he was being led toward the door of the tavern and he, the plaintiff, fell out on the sidewalk. According to this witness, he thought Nellie Touafar had been drinking a lot but he was unable upon the witness stand to say whether either Nellie Touafar or the plaintiff was drunk or sober at this time, but upon cross-examination this witness recalled making a statement prior to the trial in which he said that he thought the plaintiff was drunk and that was the reason he was going to help him out, and, on re-direct examination, this witness said: "At the present time I believe he (the plaintiff) was drinking a little. I don't know how drunk he was but I think he was drinking some. I thought he was drunk but I don't know for sure." The wife of Slim Vance was also in the tavern, and she testified that she saw plaintiff on the floor and that two men either walked or "drug" him to the door of the tavern; that Nellie Touafar was there but witness was unable to say whether she was drunk or sober; that she was walking around talking to people and came up behind plaintiff and pushed him "just as they had the door open to put him out."

Anna White was recalled as a court's witness and testified that she saw Nellie Touafar strike the plaintiff and heard her say to him that she was going to kill him. This witness continued: "I saw Mrs. Touafar slap Mr. Swan. I didn't see her knock him down. I happened to turn my face. I didn't see her knock him down but she was hitting him. She was about 15 feet from me at the time."

On behalf of the defendants, Edgar Dehn and Vito Adams testified that they were working as bartenders at the Forest City

Tavern upon the afternoon and evening of the occurrence in question. Each testified that when the plaintiff returned to the tavern in the evening each refused to sell him any more liquor^h, telling him that he had had enough; that they could hardly make out what he had to say; that his face was rosy and that he was drunk. Neither of these witnesses saw anyone strike plaintiff, but Dehn testified he saw the plaintiff lying on the floor, and each recalled that they saw two people help plaintiff to his feet and that he, Dehn, went over and took plaintiff by the arm and told him he had better go home as he had had enough to drink. On cross-examination, Dehn testified: "I state that plaintiff picked himself up off the floor and walked from the place where he was lying on the floor without any assistance except the assistance you would give your wife in crossing the street, which is simply the support of one arm, to the front door."

Louis Dilonardo, Marvin Touafar, the husband of Nellie, and Donald Nell were other witnesses who testified, and each of them swore plaintiff was intoxicated at the time of the alleged assault.

Counsel for appellant insists that the foregoing evidence proves or tends to prove (a) that Nellie Touafar was served intoxicating liquor by defendant, Dilonardo, in the premises owned by the other defendants; (b) that Nellie Touafar became intoxicated; (c) that when so intoxicated, Nellie Touafar struck the plaintiff; (d) that after being so struck by Nellie Touafar and after Nellie Touafar said she was going to kill the plaintiff, he, the plaintiff, was lying on the floor of the tavern; (e) that while plaintiff was being led to the door of the tavern, he was pushed or shoved by Nellie Touafar, and as

a result of her striking, shoving, and pushing the plaintiff, he, the plaintiff, was injured; and (f) that plaintiff was not intoxicated.

The fourth paragraph of the complaint in this case alleged that at all times on September 20, 1952, the plaintiff was not intoxicated and at no time was he under the influence of intoxicating liquors on that date. The answer of the defendants denied this allegation. The record shows that plaintiff so testified and from this his counsel argue that the truth or falsity of the testimony of all the witnesses, including the plaintiff, is a question of fact to be determined by the jury; that the plaintiff having testified that he was not drunk, it must follow that this allegation of his complaint has been sufficiently proven to warrant the submission of this issue to the jury; and, therefore, the trial court having directed a verdict erred. What the trial court held was that the only conclusion that could be drawn from a consideration of all the evidence in this record is that the plaintiff was intoxicated and that plaintiff failed to prove this material allegation of his complaint. We agree with the conclusion of the trial court, fully recognizing the rule that in this appeal we must take the evidence most favorable to the plaintiff.

In our opinion, the testimony of plaintiff that he was not intoxicated at the time of the alleged assault was not only completely discredited but his conclusion that he was not drunk should be given no weight. It is not only at variance with the testimony of all the other witnesses, but he himself testified he had been drinking intoxicating liquor and "felt his drinks." In *Stephens v. Hoffman*, 275 Ill. 497, the court was considering the testimony of Frank Gillespie, a witness who testified, on behalf of appellants, how the name of the

grantee of the deed in question in that case was changed. It was insisted by counsel that his testimony was not contradicted by any other testimony in the record and that his testimony stood unimpeached. Said the court (p. 502): "The rule undoubtedly is that the positive testimony of a witness, uncontradicted and unimpeached, either by positive testimony or by circumstantial evidence, cannot be disregarded by either court or jury; but there may be such an inherent improbability in the statement or testimony of a witness that the court may disregard it even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions or discrepancies in his testimony as to discredit him."

Courts are not required to believe an unreasonable story or accept a conclusion of a party to a suit merely because such conclusion is sworn to by a witness on the trial of a case. (People v. LeMorte, 289 Ill. 11, 24; Forsberg v. Around Town Club, Inc., 316 Ill. App. 661, 665.) The Forsberg case was a Dram Shop action, the plaintiff seeking a recovery for injuries which he sustained when assaulted by three persons who became intoxicated from liquor sold or given them by the defendants. The plaintiff insisted that he was sober at the time and denied he was intoxicated or that he provoked the assault. The appellate court held upon a consideration of the record that he was drunk and said that the court had taken into consideration his entire testimony, the history of his previous day and night drinking and, also, his statement that shortly before seven o'clock on the morning of the occurrence in question he had stopped at a

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tavern for "a few drinks before going to work." The evidence in the Forsberg case also disclosed that the plaintiff had purchased a drink of intoxicating liquor for his three assailants, and in reversing the judgment of the trial court for not directing a verdict in favor of the defendant at the close of the case, the court said: "It is plaintiff's contention that the question of his intoxication was a fact for the jury. This contention might have merit if that were the only factor involved in the consideration of the question of law whether plaintiff was assaulted as a result of his own conduct. There is a further factor of provocation. Plaintiff insists he did nothing to provoke the assault and suggests that he purchased the drink for his assailants in pursuance of an appeasement policy. If the drink contributed to their intoxication, we do not see that plaintiff would be any better off whether appeasement or any other motive was his policy. We believe the rule is uniform that where an injured person contributes in whole or in part to the intoxication of his assailant he cannot recover. Hayes v. Waite, 36 Ill. App. 397; Bowman v. O'Brien, 303 Ill. App. 630."

So in the instant case, the record shows that plaintiff started out on the morning of September 20, 1952, and not long before noon stopped at a tavern and had two drinks of whiskey and two drinks of beer with a friend. At five that afternoon according to ^{his} testimony, but according to others it was earlier in the afternoon, he went to defendant's tavern and ~~he~~ drank two glasses of beer and purchased two drinks of intoxicating liquor for his assailant. He then left defendant's tavern and walked a block and went to Frank's Tavern where he met a friend and treated him to a couple of drinks, but he was unable to recall whether he had a glass of beer there or not but knew he drank a 7-Up (an unusual, unforgettable occurrence),

and he guessed he was at Frank's Tavern for a couple of hours and then returned to defendant's tavern and, while standing at the bar waiting to be served, he was assaulted. Plaintiff's testimony^{as abstracted} was that just before he was assaulted "I felt my drinks but was not intoxicated," and, according to his evidence, he was not served with a drink just before he was assaulted, and the reason given by all the other witnesses (and plaintiff did not deny it) was because he was drunk and the bartenders refused to serve him. All of the witnesses ~~were~~ present at this time and who testified and expressed an opinion as to his condition said he was drunk. These witnesses were Edgar Dehn, Vita Adamo, Louis Dilonardo, Marvin Touafar, Donald Nell, Donald Johnson, and Sim Vance. Of these seven witnesses, Donald Johnson and Sim Vance were called by the plaintiff. Under all the evidence found in this record there is no question about plaintiff's intoxication or the intoxication of Nellie Touafar, his assailant, and according to the plaintiff's own testimony, as well as that of Louis Dilonardo and Nellie Touafar, the plaintiff contributed to her intoxication. The plaintiff says he purchased two drinks for her which she consumed and so does Nellie Touafar and, also, the barkeeper, and no one denies it. As said in Forsberg v. Around Town Club, Inc., 316 Ill. App. 661, at page 665, the rule is uniform that where an injured person contributes in whole or in part to the intoxication of his assailant he cannot recover.

The trial court did not err in rendering the judgment appealed from and that judgment will be affirmed.

Judgment affirmed.

Wolfe, P. J. Concur,

Crow, J. Took no part.

Adopted by the committee.

Resolved, That the committee do report.

The committee do report that they have considered the same.

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5 I.A.^{2d} 234

Agenda No. 2

Appeal from
County Court of
Schuyler County

Joseph R. Long was tried in the County Court of Schuyler County on a charge of driving a motor vehicle while under the influence of intoxicating liquor. He was found guilty by a jury and sentenced to 90 days imprisonment in the County jail and to pay a fine of \$500.00. From such judgment this appeal is prosecuted.

Defendant seeks only reversal of the judgment and urges that the cause not be remanded for a new trial.

The principal points raised and argued by the defendant in support of his contention for reversal are that: (1) The People failed to prove the defendant guilty beyond a reasonable doubt; (2) The Court erred in ruling upon the admissibility of certain evidence, and; (3) In permitting the jury to separate for the night before reaching a verdict.

The defendant's first point requires an examination of the evidence.



SECRET

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

February 1964, E. A. 1000

Page 1

General No. 1000

STANDARD FORM NO. 64
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

Office of the Director of Investigation
Washington, D. C. 20535

Investigation of the activities of the
Internal Security - Communist

General No. 1000

On February 19, 1964, the following information was received from the
Office of the Director of Investigation, Washington, D. C. 20535:
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Washington, D. C. 20535, on February 19, 1964:

General No. 1000

Davis and Kingering, State Highway Police Officers and witnesses for the People, testified they observed the defendant driving his automobile about 12:30 a.m. at the intersection of Routes 24 and 67 in the City of Rushville when he failed to stop for a stop sign; that they arrested defendant and took him to the County jail; and that they talked with defendant. Both of these witnesses testified as to the appearance of the defendant, his manner of speech, and the presence of the odor of alcohol on his breath. They further testified that defendant staggered when he walked; that defendant told them he had been drinking whiskey; and they gave their opinion that defendant was then under the influence of intoxicating liquor.

Paul Gay, deputy sheriff of Schuyler County, testified to observing defendant when he was admitted to the County jail following his arrest; that he could smell intoxicating liquor on defendant's breath; and that in the opinion of the witnesses defendant was under the influence of intoxicating liquor.

The defendant testified he came to Rushville about 6:00 o'clock in the evening prior to his arrest; that he spent close to 3½ hours in Ed's Tavern, during which time he had two drinks of whiskey; that he did not stagger; that he did not tell the officers anything about his drinking; and that he was not drunk and was able to drive his car. Everett Moore, who was riding with defendant just prior to his arrest, testified that he visited with defendant in Ed's Tavern for about 2 hours where he and the defendant each had a drink, and that defendant was not drunk. A number of other witnesses who saw defendant in the Tavern, but none of whom appear

[illegible]

to have observed the defendant at the time of his arrest, testified that they did not think the defendant was drunk.

While the foregoing does not constitute a detailed recital of the evidence in the record, it is sufficient to indicate the conflict therein as it relates to the question whether the defendant was under the influence of intoxicating liquor at the time of his arrest. Determination of such a fact question is committed to the jury. It is their peculiar province to judge the credibility of the witnesses and the weight of the evidence. People v. Booker, 378 Ill. 334; People v. Kelly, 378 Ill. 273; People v. Hanisch, 361 Ill. 465.

Reasonable doubt as to the defendant's guilt was not raised by reason of the mere fact that the testimony of the defendant and his witnesses was in conflict with that given by the witnesses for the People. As was said by the Supreme Court in People v. Martin, 303 Ill. 233:

"Because the testimony is conflicting does not necessarily raise a well founded reasonable doubt. It is very seldom there is no conflict in the testimony of the respective sides, and there would rarely be a conviction in a criminal case if a defendant's guilt could only be established by uncontradicted testimony."

There is nothing in the record before this Court indicating any reason which might have led the jury to disbelieve the People's witnesses. In fact, their testimony was corroborated in many details by witnesses for the defense. The credibility of witnesses and weight to be given their testimony are determined by the jury, which is afforded the opportunity of viewing the conduct and demeanor of the witnesses while testifying. People v. Howe, 375 Ill. 130.

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There is nothing in the present evidence which indicates that the person who was arrested by the police on 10/10/68 was the same person as the person who was arrested by the police on 10/10/67.

In the absence of prejudicial error in the record a judgment of conviction will not be reversed unless the verdict is contrary to the weight of the evidence. People v. Canino, 376 Ill. 640. In the instant case we are convinced the jury's verdict should not be disturbed on the ground that the evidence was insufficient to establish the defendant's guilt.

The defendant contends the trial court erred in ruling on the competency of certain evidence and in failing to admonish the jury to disregard certain incompetent statements made by the People's witnesses and to which objections were sustained. We have examined these statements and rulings complained of and are satisfied the same reflect no prejudicial error which would warrant reversal of the judgment.

The further contention of the defendant is that the Court erred in permitting the jury to separate for the night without having returned a verdict. The weight of authority on the question as to whether a jury should be kept together until a verdict is reached seems to be to the effect that it is largely a matter within the sound discretion of the Court. It has been held in capital cases that a jury should not be permitted to separate. However, in People v. Wilson, 400 Ill. 461, the Court, after reviewing its prior holdings on the question and referring to People v. Casino, 295 Ill. 204, cited by the defendant, concluded the ruling to be that where separation of the jury is the only error relied upon there must be a showing of prejudice. It does not appear from the record that defendant's rights were in any manner prejudiced by reason of the jury

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separating. Furthermore, the record shows that the action of the trial court in permitting the jury to separate was with the consent of the defendant's counsel.

Finding no error requiring reversal in the record, the judgment of the County Court of Schuyler County is affirmed.

Affirmed.

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of the defendant's counsel.

1980

Abstract

69 A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A.D. 1955

15 I.A.^{2d} 235

General No. 9971

Agenda No. 11

Mary Malcomson,)
)
Plaintiff-Appellant,)
)
vs.)
)
Robert A. Malcomson,)
)
Defendant-Appellee.)
)
Robert A. Malcomson,)
)
Counterclaimant-Appellee,)
)
vs.)
)
Mary Malcomson,)
)
Counterdefendant-Appellant.)

Appeal from
Circuit Court of
Schuyler County

CARROLL, P.J.

Plaintiff appeals from a decree of the Circuit Court of Schuyler County granting a divorce to defendant on his counterclaim charging plaintiff with adultery.

Plaintiff filed her complaint for separate maintenance on July 6, 1951, alleging that the parties were married on March 12, 1941; that they lived together from said date until January 2, 1951, when, without just cause, the defendant deserted her; and that plaintiff, since said time, has lived separate and apart from the defendant without fault on her part.

RECEIVED BY THE
FEDERAL BUREAU OF
INVESTIGATION
U. S. DEPARTMENT OF JUSTICE

Washington, D. C. 20535

Albany, N. Y.

Albany, N. Y.

Very respectfully,

Respectfully,
[Signature]

cc.

Robert A. [Name]

Robert A. [Name]

Robert A. [Name]

Respectfully,
[Signature]

cc.

Very respectfully,

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[Signature]

Albany, N. Y.

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The defendant answered the complaint and filed a counterclaim charging plaintiff with adultery. In said counterclaim the defendant alleged that on November 1, 1951, which was subsequent to the filing of the complaint, the parties entered into an agreement providing for the settlement of their property rights.

Plaintiff contends that the evidence is insufficient to support the decree herein; that there was sufficient recriminatory evidence to bar the granting of a divorce to defendant; that the property settlement agreement is void as being against public policy; and that plaintiff should have been awarded separate maintenance.

The record shows the parties were married March 14, 1941; that plaintiff had 2 children by a previous marriage; that defendant was a bachelor who resided with his mother and 3 sisters on a farm east of Rushville, Illinois; that after the marriage the parties went to live in a house on land owned by defendant's sister; and that the defendant assisted his mother in carrying on her farm.

Late in 1947 marital discord developed between the parties. Plaintiff appears to have complained that the defendant spent too much time with his blood relatives. On December 1, 1947, plaintiff left her home for 3 months. She later went to a hospital at Excelsior Springs. Sometime later she went to Lewiston, Illinois, where she remained for almost a year, returning to her home about August 1, 1949. There is also evidence that the plaintiff was frequently absent from her home during the period from August 1, 1949 to the date of the separation on January 2, 1951.

The separation appears to have occurred after defendant found plaintiff on the evening of January 2, 1951 in the company of one Clinton Smith. Defendant then moved to the home of his mother. The plaintiff also left the home and went to Abingdon, Illinois, where she was residing at the time of the filing of her complaint.

On November 1, 1951, after the filing of the complaint, answer and counterclaim, the parties, who were both represented by counsel, entered into a written agreement under which defendant agreed to pay plaintiff \$1,300.00 in settlement of all property rights arising out of the marriage. \$1,000.00 was paid to plaintiff upon the execution of said agreement. It was provided therein that the balance of \$300.00 should be paid to plaintiff 30 days after she vacated the family residence near Rushville. The plaintiff refused to accept the balance, claiming payment thereof was late and that she should have more money. The defendant tendered said balance into Court, and the decree provided for payment thereof to plaintiff.

Before the plaintiff could sustain her complaint for separate maintenance it was necessary for her to show not only a good cause for living separate and apart from the defendant, but also that such living apart was without fault on her part. Decker v. Decker, 279 Ill. 300; Hoffman v. Hoffman, 316 Ill. 204.

The well settled law is that adultery on the part of the wife discharges the husband from all obligations to support her and constitutes a good defense to a suit by her for separate maintenance. 27 Am. Jur. Husband and Wife, Sec. 409; Rawson v. Rawson, 37 Ill. App. 491.

[illegible]

Accordingly, the basic question for decision on this appeal is whether the charge of adultery is sustained by the evidence. Since the evidence was conflicting and was heard by the Chancellor in open Court his findings of fact will not be disturbed by a reviewing court unless the same appear to be clearly and palpably erroneous. Heyman v. Heyman, 210 Ill. 524; Biggerstaff v. Biggerstaff, 180 Ill. 407; Hosto v. Hosto, 183 Ill. App. 463.

While the defendant was required to prove the charge of adultery by a preponderance of the evidence, it was not necessary that the direct fact thereof be proved. As the Court said in Heyman v. Heyman, supra: "The fact is inferred from circumstances that lead to it by fair inferences, as a necessary conclusion."

Examination of the evidence discloses a witness for defendant testified he saw plaintiff stop at Clinton Smith's garage on May 18, 1951 at about 5:15 p.m.; that Smith entered her car and he and plaintiff drove to a cafe; that they later came out of the cafe and drove back to the garage; that Smith then got into his own car and followed plaintiff's car; that plaintiff parked her car 7 or 8 blocks from the Cullen Hotel where Smith then lived; that she then got into Smith's car and rode with him to the hotel; that she and Smith entered the hotel and went upstairs; that witness also went upstairs and inspected the hall to ascertain the whereabouts of the parties; that they were not in the hall; that they remained upstairs approximately an hour; that they came out of the hotel together and entered Smith's car; that they then went to an eating place and later to a theatre; and that after leaving the theatre Smith drove plaintiff to where her

There is still no evidence of recovery, and, possibly,

car was parked. The plaintiff denied occupying a room in the Cullen Hotel with Smith. However, she admitted having ^{been} to his room but did not remember the dates on which she had been there. The defendant testified to seeing plaintiff and Smith together on more than one occasion and particularly on the night of January 2, 1951. He further testified that after this occasion he left his home and did not thereafter live with plaintiff. He further testified to numerous instances when plaintiff remained away from her home until the very late night hours or until the following morning and that none of these absences were explained by plaintiff.

There is undisputed evidence in the record that plaintiff kept house for Smith, who was an unmarried man; that she lived in his house in Abingdon for a year; and that she received no compensation for her services. Plaintiff, in her testimony, admitted her association with Smith but denied improper relations with him. She was also unable to say where she stayed the nights she was absent from her home. Her answer to a question on that subject elicited the following answer:

"Yes, sir, I was gone from home all night for several days. No, I wouldn't attempt to tell you where I stayed on all of those nights. No, sir, I didn't always stay by myself."

There is other testimony in the record as to the conduct of plaintiff during the period from late in 1947 to the separation of the parties in January, 1951, much of which would appear to be inconsistent with any reasonable conception of what is expected of a true and dutiful wife.

This testimony, which we have not attempted to detail at

can be seen. The following details are given in the report
of the Committee. However, the witness stated that he was not
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length but which is in substance as herein set forth, and the circumstances shown by the evidence would seem to lead by fair inference to the conclusion which the Chancellor reached.

Plaintiff correctly argues that adultery is never presumed on mere suspicion. However, such salutary rule cannot be invoked to avoid an inescapable conclusion impelled by the evidence. In the evidence in the instant case we find no reasonable explanation of plaintiff's conduct other than that contended for by the defendant.

The learned Chancellor who saw and heard the witnesses testify was in a better position than is this Court to pass upon their credibility. Heyman v. Heyman, supra. In view of the character of the testimony in the instant case, the question of the credibility of the witnesses became highly important. There would appear to be no basis in the record justifying this Court in disagreeing with the Chancellor's conclusion.

Since we have reached the conclusion that the Circuit Court did not err in granting the defendant a divorce on his counterclaim, it will be unnecessary to consider the contentions of the plaintiff with reference to the property settlement agreement.

Concluding as we do that the findings of the Circuit Court are sustained by the evidence, its judgment is affirmed.

Affirmed.

length of time in its history as a nation and as a people, and the extent of its influence on the world scene is such as to make it a matter of course that it should be considered as a world power.

It is a fact that the United States is a world power, and it is a fact that the United States is a world power. It is a fact that the United States is a world power, and it is a fact that the United States is a world power. It is a fact that the United States is a world power, and it is a fact that the United States is a world power. It is a fact that the United States is a world power, and it is a fact that the United States is a world power.

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5 I.A.^{2d} 235

Agenda No. 17

Hulcher Soya Products, Inc.,

Plaintiff-Appellee,

vs.

Appeal from
Circuit Court of
Sangamon County.

Millers' Mutual Fire Insurance Association,
a corporation; Millers National Insurance
Company, a corporation; Mill Owners Mutual
Fire Insurance Company, a corporation;
Michigan Millers Mutual Fire Insurance
Company, a corporation; Grain Dealers National
Mutual Fire Insurance Company, a corporation,

Defendants-Appellants.

CARROLL, P. J.

This action was brought in the Circuit Court of Sangamon County, Illinois, to recover damages for the breach of seven (7) insurance contracts insuring plaintiff against loss and damage by explosion, among other perils.

The jury returned a verdict for the plaintiff. The trial court over-ruled defendants' motions for judgment notwithstanding the verdict and for a new trial and entered judgment on the verdict. From such judgment defendants appeal.

The occurrence in question which plaintiff seeks to characterize as an "explosion" occurred on the 10th day of July, 1951. Plaintiff had, during the latter part of 1950 and the early part of 1951, caused to be erected a new elevator building. The building was 40 feet wide, 60 feet long, and 130 feet high. It was constructed

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THE UNIVERSITY OF CHICAGO

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1. The first group of companies is the "Big Five" - General Electric, General Motors, Ford, IBM, and International Business Machines Corporation. These companies are the largest and most influential in the industry.

The jury returned a verdict 2 - for Plaintiff. The jury
found over-heat (exhaustion) was the cause of the accident.
The verdict was for a new trial and entered judgment on the verdict
from which judgment was entered.

was 40 feet wide, 60 feet long, and 17 feet high. It was constructed in 1927, caused to be erected a few months earlier. The building finished now, during the latter part of 1925 and the early part of 1926, as an "extension" occurred on the 10th day of July, 1926. The construction is provided with electrical wiring as shown.

of concrete containing steel rods of varying thickness as reinforcing materials. The building was one continuous structure on the outside and was divided into numerous bins and compartments on the inside, which bins and compartments were integral parts of the structure and were formed by pouring the concrete material of which they were made at the same time as the outside walls. These bins and compartments were also tied into the outside walls by reinforcing steel rods of varying thickness.

Upon the completion of the building, plaintiff and defendants entered into certain insurance contracts. Some of these insurance contracts insured plaintiff against loss or damage to the grain in the elevator alone, and some insured plaintiff against loss or damage to the grain in the elevator and to the elevator structure itself. Each of the policies provide for the payment of damages caused by explosion. The elevator was put into use in the late fall of 1950 and was in continuous use until the 10th day of July, 1951, on which date 18,716 bushels of wheat were stored in the elevator. On that date at or about 1:30 o'clock p.m. a loud noise was heard by witnesses; dust and what appeared to be smoke was seen to rise from the north side of the elevator; and it appeared at the time that the entire north side of the elevator was forced out. Upon examination after the occurrence, it was found that the lower third of the wall was forced completely away and shattered and the balance of the wall, almost to the top of the elevator, was dislodged and hanging to the east and west walls by the reinforcing steel rods contained in the three walls. The grain in the bins so exposed ran or was forced out

of concrete buildings and the use of various materials as indicated on the drawings. The building was constructed according to the plan and was divided into three main sections as follows: the main body, which was constructed with concrete walls and floors, and was covered by a pitched roof; the wings, which were constructed with concrete walls and floors, and were covered by a pitched roof; and the entrance, which was constructed with concrete walls and floors, and was covered by a pitched roof. The building was constructed in accordance with the plan and was divided into three main sections as follows: the main body, which was constructed with concrete walls and floors, and was covered by a pitched roof; the wings, which were constructed with concrete walls and floors, and were covered by a pitched roof; and the entrance, which was constructed with concrete walls and floors, and was covered by a pitched roof.

[illegible]

and was spread out over an extended area and pieces of concrete from the walls were found as far away as 125 feet, and small pieces as far away as 200 feet. The insurers were notified and refused to pay the damages claimed under the explosion clause, assigning as their reason for such refusal that the damage was not caused by an explosion.

Thereafter, suit was filed on the contracts of insurance and trial was had before a jury.

It is defendants' contention that the verdict of the jury is against the manifest weight of the evidence; that the trial court erred in its rulings on the admissibility of evidence and in instructing the jury; and that defendants' motion for a new trial should have been granted.

If, as defendants argue, the verdict was against the preponderance of the evidence, it then became the duty of the trial court to set it aside and grant a new trial. Likewise, if such verdict is manifestly against the weight of the evidence, then this court should reverse the judgment and remand the cause to the trial court for a new trial. Read v. Friel, 327 Ill. App. 532; Stevenson v. Byrne, 3 Ill. App. 2d 43.

To determine whether or not the trial court erred in denying defendants' motion for a new trial, an examination of the record must be made. In this case the issue can be narrowed down to the determination of whether or not plaintiff proved by a preponderance of the evidence that an explosion occurred.

the same time, the fact that the same person was the only one who was able to get the information out of the man was a very important factor in the investigation.

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10. The following information is for the year ended 31st March 1994:

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2. The evidence is not sufficient to establish that the defendant was in the vicinity of the crime scene at the time the crime was committed.

There appears to be no disagreement among the witnesses for both sides that the loss was sustained on the 10th day of July, 1951 at 1:30 p.m. There appears to be no disagreement among the witnesses that the north wall of the elevator was forced out accompanied by a loud noise, dust, grain, broken and crushed concrete, and some violence as shown by the pieces of concrete being thrown away from the building approximately 200 feet. A sharp disagreement exists between plaintiff and defendant on the question of what caused the wall to rupture and to be forced away from the east and west walls. Plaintiff claims he has proved an explosion occurred and defendants contend that no explosion as such could have occurred and that the damage to the building and the contents was occasioned by a structural defect in the building itself.

Plaintiff's occurrence witnesses described the occurrence variously as follows: "a cloud of smoke and heard a roar which sounded like a train or explosion or something"; "heard a roaring noise"; "heard a big boom and saw dust"; "heard a blast"; "heard a loud noise and saw a lot of dirt, dust and wheat"; "heard a sound similar to a switch engine bumping a bunch of steel hopper cars"; "or heard a boom."

Plaintiff's expert witness, Jenkins, testified that in his opinion an explosion had occurred, but based it on, among other factors, an expansion of the contents of the elevator, cause of which expansion he was not qualified to express since he had no knowledge, experience or training in the field of biochemistry. Plaintiff's other expert, Merchant, never was asked for nor did he express an opinion relative to whether or not an explosion occurred.

[illegible]

Revised Bill H.R. 1000, 100th Congress, 1st Session

For a long time, the people of the world have been looking for a way to live in peace and harmony. The world is a big place, and there are many different cultures and religions. But we all have one thing in common: we all want to live in a better world. We want a world where everyone is treated fairly and with respect. We want a world where there is no war and no violence. We want a world where we can all live together in peace and harmony. This is the dream of the world, and it is a dream that we all should strive to achieve. We can do this by working together and by treating each other with kindness and respect. We can make the world a better place for everyone, and we can live in peace and harmony. This is the goal of the world, and it is a goal that we all should strive to achieve.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Defendants' experts, whose qualifications were not contested, testified that in their opinion the elevator, on the 10th day of July, 1951, contained no explosive materials, either individually or collectively, that dampening the wheat in the bins would not cause it to expand, but rather would cause it to contract in mass, that the only gas that could have been naturally present was carbon dioxide, which is an inert gas, noncombustible, and in fact used in some forms of fire extinguishers.

The court instructed the jury on what the elements of the proof of an explosion were. These are the following:

- "1. A sudden accident violent bursting or breaking,
2. That such bursting or breaking, if any, was caused by a suddenly developed internal force;
3. That such bursting or breaking, if any, was accompanied by a sudden or rapid expansion of air; and,
4. That such bursting or breaking was accompanied by a sharp noise or report."

The record discloses no direct evidence of the sudden development of an internal force or that the incident characterised by plaintiff as an explosion was accompanied by a sudden or rapid expansion of air. The doctrine of res ipsa loquitur is not applicable here. The proof or attempted proof of the existence of the suddenly developed internal force and the rapid expansion of air is based as far as plaintiff's proof is concerned upon the fact that the north wall of the building was forced out accompanied by a loud noise and the propelling of pieces of cement from the wall a considerable distance therefrom. With this circumstantial evidence,

It is true that the Commission has not yet received any information from the Government of the United States regarding the activities of the American Friends of the Soviet Union, but it is not possible to say whether or not the Commission has received any information from the Government of the United States regarding the activities of the American Friends of the Soviet Union.

[illegible]

plaintiff seeks to prove the facts mentioned above. However, a fact cannot be reasonably inferred from evidence when the existence of another fact inconsistent with the first, or the complete non-existence of the first fact, can be from the same evidence inferred with equal certainty. Thus, a fact cannot be said to be established by circumstantial evidence unless the facts relied on are of such a nature and are so related to each other that it is the only conclusion that can reasonably be drawn from them. Pure Torpedo Corp. v. Nation, 327 Ill. App. 28; Condon v. Schoenfeld, 214 Ill. 226; Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96; Galner v. Irather, 301 Ill. App. 224; Kelly v. Public Service Co., 300 Ill. App. 354.

In this case the evidence does not appear to reasonably support only plaintiff's theory that the damages in question resulted from an explosion. We are of the opinion that there can be drawn therefrom the equally consistent inference that the damage to the north wall of the building was caused by a structural failure while under the stress of the load of 18,716 bushels of wheat independently of whether or not there was a sudden build up of internal forces and an expansion of air.

The verdict of the jury would therefore appear to be against the manifest weight of the evidence.

Concluding as we do that the judgment must be reversed for the reasons herein indicated, it will be unnecessary to consider defendant's further contentions that the trial court erred in its rulings on the admission of evidence and in the giving of certain instructions to the jury. Undoubtedly, any such error would not

occur upon another trial.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

THE JOURNAL OF THE

ROYAL SOCIETY OF MEDICINE

VOLUME 100

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5 I.A.^{2d} 236

THIRD DISTRICT

FEBRUARY TERM A.D. 1955

General No. 9974

Agenda No. 13

Leslie Newton.

Plaintiff,
Counter-defendant - Appellee,

vs.

Appeal from

Lyle B. Moushon, doing business as
Moushon Construction Company,
Defendant,
Counterclaimant-

Circuit Court of
Greene County

Hibbe, J.

Plaintiff Leslie Newton and defendant Lyle B. Moushon entered into an oral contract on April 25, 1952 pursuant to which plaintiff was to drill and blast rock in defendant's quarry for use in defendant's rock crusher. It was agreed that plaintiff would receive thirty-two cents per ton of rock weighed out of the quarry. From May 1, 1952 to January 13, 1953, plaintiff blasted 34,313,165 tons of rock. At intervals during this period defendant paid plaintiff on account the total sum of \$6,355.06 after deducting certain agreed charges. On January 13, 1953, defendant furnished plaintiff with a statement showing the number of tons of rock blasted, crushed and

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2. Сведения об участии в работе
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в суде
по делу - 100%

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Statement showing the number of tons of rock blasted, drilled and charges. On January 13, 1953, defendant furnished Plaintiff with a statement showing the total cost of \$1,221.00 after deducting certain amount of rock. At intervals during this period defendant would Plaintiff \$5,100 to January 13, 1953, Plaintiff received \$2,313.00 from thirty-two cubic feet of rock weighed out of the quarry. From defendant's rock crusher. It was stated that Plaintiff would receive was to drill and blast rock in defendant's quarry for use in into an oral contract on April 15, 1953 pursuant to which Plaintiff Plaintiff would be paid \$100,000 and defendant \$100,000.

weighed out of the quarry prior to that date showing balance due at the contract price less deductions of \$3,959.65. A similar statement for rock blasted prior to January 13, 1952 but crushed and weighed out of the quarry during January, February and March 1953 was furnished plaintiff showing an additional sum due of \$2,156.42 and a total balance owed plaintiff of \$6,116.07. From this defendant deducted certain costs of labor, dynamite and drill steel amounting to \$1,190.95 leaving a final balance due plaintiff of \$4,925.12. Because defendant refused to pay this sum, plaintiff started suit in the Circuit Court of Greene County. Defendant filed a counterclaim and the case was heard by the court who gave judgment to plaintiff in the sum of \$4,611.28, the amount claimed by plaintiff adjusted to compensate for arithmetical errors in the original computation. Defendant has appealed to this court.

Defendant contends here and it was the theory upon which his counterclaim was based in the trial court that in addition to the terms of the oral agreement recited above there were additional terms, i.e., that plaintiff would pay rent for certain of defendant's equipment used by him and that he would break the rock into pieces sufficiently small to permit them to be fed into defendant's crusher. There is evidence in the record that plaintiff used defendant's air compressor, gasoline shovel and bulldozer and that the fair rental value of the equipment for the time used was \$2,350. There is also

weighed out of the quantity which is not fair showing balance due
at the court of justice I am indebted of \$1,250.00. A similar
statement for work finished prior to January 17, 1927 has been
sent along with of the quantity of work done, finished and done
1927 was finished quantity showed an additional sum due of
\$2,150.00 and a total balance owed plaintiff of \$3,400.00. This
said statement reflected certain items of labor, materials and drill
used amounting to \$1,150.00 less than a final balance due plaintiff
of \$1,250.00. Because defendant refused to pay this sum, plaintiff
sought suit in the District Court of Kansas County. Defendant filed
a counterclaim and the case was sent to the court and after judgment
to plaintiff in the sum of \$3,150.00, the second claim of plaintiff
adjusted to defendant for additional items in the original
statement. Defendant was ordered to pay court.
Defendant contends that and it was not ready to pay this
counterclaim was based in the trial court was in violation of the
terms of the oral agreement which shows there were additional
items, i.e., work actually done and not for services of defendant's
equipment used on the land and that he could show the work done
sufficiently well to make him to be for the defendant's account.
There is evidence in the record that plaintiff used defendant's air
compressor, gasoline engine and equipment and that the fair market
value of the equipment for the time used was \$2,150.00. There is also

evidence that there was a substantial number of rocks left by plaintiff which were too large to go through defendant's compressor. Defendant asked reimbursement on item of insurance cost amounting to \$200, for equipment rental of \$2,350 and for damages from defendant for rocks left that were too large to go through the crusher. The ad damnum clause in this counterclaim was for \$15,000.

On rebuttal, plaintiff testified that he did not agree to pay rent for the use of defendant's equipment. Moreover, he pointed out that in none of the statements furnished him by defendant was there any deduction for such rental or for insurance. Plaintiff admitted that there were some large rocks left by the blasting and stated that defendant agreed to reduce these by secondary blasting, charging plaintiff only for the dynamite.

The only issue in this case is the terms of the contract between plaintiff and defendant. The trial court determined this in plaintiff's favor. He had the advantage of seeing the witnesses and assessing their credibility at first hand. We are confronted only with the inanimate words of the printed page. It is a fundamental canon of appellate review that determination of questions of fact by a trial court will not be overturned unless manifestly wrong. (Floberg v. Floberg, 358 Ill. 626, 193 N.E. 456; Lewis v. Lewis, 316 Ill. 447, 147 N.E. 411.) The judgment of the trial court is not subject to that challenge in this case. There is sufficient evidence to support plaintiff's version of the transaction. The fact that defendant claimed

evidence that there was a substantial number of rooms left by
plaintiff when it was too large to be shown defendant's connection.
Defendant also retained an item of furniture cost amounting to
\$200, for equipment rental at \$2,750 and for charges from defendant
for rooms left that were too large to be shown defendant's connection. The
of damage claims in this connection was for \$15,000.
On rebuttal, plaintiff testified that he did not agree to pay
rent for the use of defendant's equipment. However, he related that
that in some of the statements furnished him by defendant, the words
and deduction for each month of the month. Plaintiff testified
that there were some large items left by the plaintiff and that
that defendant agreed to return items in reasonably pleasing, changing
plaintiff only for the plaintiff.
The only issue in this case is the issue of the correct version
plaintiff and defendant. The trial court determined that in plaintiff's
favor. In fact the admission of such in the evidence and reasoning
that on plaintiff in this case. He was contradicted only with the
inappropriate words of the trial court. It is a fundamental principle of
appellate review that determination of questions of fact for a trial
court will not be overturned unless manifestly wrong. Winters v.
Florida, 308 U.S. 652, 100 S.Ct. 1011, 308 U.S. 652,
107 S.Ct. 1111. The judgment of the trial court is not subject to being
disturbed in this case. There is sufficient evidence to support
plaintiff's version of the transaction. The fact that defendant obtained

no deduction in his periodic statements for the alleged charges he now asserts is especially significant. The judgment of the Circuit Court of Greene County is therefore affirmed.

Judgment affirmed.

as indicated in the various statements the work being done is
not entirely in accordance with the program of the
Government of the United States.

Respectfully,
Sincerely,
Very truly yours,
[Signature]

8A

February Term, A. D. 1955

5 I.A.^{2d} 237

Agenda No. 6

Appeal from
Circuit Court of
Macon County.

REYNOLDS, J.

Plaintiff brought this action for personal injuries and property damage resulting from an automobile collision between the car in which the plaintiff was riding and the car operated by the defendant. A jury trial was had, resulting in a verdict in favor of the plaintiff and the jury answering two special interrogatories in favor of the plaintiff. One of the interrogatories was answered to the effect that the plaintiff was in the exercise of due care and caution and the other that the defendant was guilty of wilful and wanton misconduct.

A motion for directed verdict was made at the close of the plaintiff's case and denied by the court. It was renewed at the close of all of the evidence and again denied by the court. After verdict and judgment entered thereon, the defendant filed a motion for a judgment non obstante veredicto and in the alternative, for a new trial. The court granted the motion for judgment non obstante veredicto and the motion for a new trial in the event that the

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Abstract

STATE OF ILLINOIS
Circuit Court
Third District

February Term, A. D. 1932

Agenda No. 6

General No. 9032

Alleen McInerney,	Plaintiff-Appellant,
vs.	
Raymond E. Winter,	Defendant-Appellee.

REYNOLDS, J.

Plaintiff brought this action for personal injuries and property damage resulting from an automobile collision between the car in which the plaintiff was riding and the car operated by the defendant. A jury trial was had, resulting in a verdict in favor of the plaintiff and the jury answering two special interrogatories in favor of the plaintiff. One of the interrogatories was answered to the effect that the plaintiff was in the exercise of due care and caution and the other that the defendant was guilty of willful and wanton misconduct.

A motion for directed verdict was made at the close of the plaintiff's case and denied by the court. It was renewed at the close of all of the evidence and again denied by the court. After verdict and judgment entered thereon, the defendant filed a motion for a judgment non obstante veredicto and in the alternative, for a new trial. The court granted the motion for judgment non obstante veredicto and the action for a new trial in the event that the

judgment for the defendant should be reversed. The plaintiff appeals from the order of the court allowing the motion for judgment notwithstanding the verdict and for allowing the motion for a new trial in event of reversal of the judgment.

The first question presented is whether it was error for the trial court to grant defendant's motion for judgment notwithstanding the verdict. "A motion for directed verdict or for judgment notwithstanding the verdict presents the single question whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case." Lindroth v. Walgreen Co., 407 Ill. 121,130; Gorzynski v. Nugent, 402 Ill. 147; Weinstein v. Metropolitan Life Ins. Co., 389 Ill. 571.

The parties of course do not agree as to whether the defendant was guilty of wilful and wanton misconduct as charged in Count II of the complaint and as to whether the plaintiff was guilty of similar conduct so as to prevent her recovery. It is not the province of the trial court or this court to weigh the evidence or question the credibility of the witnesses on this issue. The court must take all the evidence and the inferences that may be reasonably drawn therefrom as true and if there is any evidence in the record, together with all reasonable inferences, tending to support the plaintiff's case, it is error to allow the motion for judgment notwithstanding the verdict. It therefore becomes necessary, in order to determine the question, that we examine the evidence presented, tending to prove the plaintiff's case.

In view of reversal of the following:

withdrawing the request and for allowing the action for a new trial from the order of the court allowing the action for judgment and judgment.

judgment for the defendant should be reversed. The plaintiff appeals.

The first question presented is whether it was error for the trial court to grant defendant's motion for judgment notwithstanding the verdict. "A motion for directed verdict or for judgment notwithstanding the verdict presents the issue whether there is no reasonable jury question which, standing alone and taken with all the facts and circumstances, entitles the defendant to judgment. Its purpose is not to deprive the jury of its function, but to prevent a verdict which is manifestly unjust." United States v. Galt, 407 U.S. 121, 130; Conover v. Conover, 402 U.S. 127; United States v. Galt, 407 U.S. 121, 130; Conover v. Conover, 402 U.S. 127.

The parties to the case do not agree as to whether the defendant was guilty of willful and malicious misconduct as charged in Count II of the complaint and as to whether the plaintiff was guilty of negligence as charged in Count I. It is not the province of the court to decide these questions. It is the province of the jury to decide them. The court must leave all the evidence and the inferences therefrom to the jury, and it must not draw conclusions on facts and if there is any evidence in the record, however slight, in support of the defendant's position, the court must leave it with all reasonable inferences, tending to support the defendant's case. It is error to allow the entire testimony to stand against the plaintiff. It is the province of the jury to decide the questions, and to determine the questions, that we cannot do without evidence presented to prove the plaintiff's case.

The accident occurred on December 27, 1950 at about 2:00 o'clock in the afternoon on Illinois Route 48 about two and one-half miles southwest of Decatur, Illinois. The weather was clear, the road was dry and at the point of collision, was level and straight. The plaintiff was making a left turn into a driveway leading to a floral shop. The highway was made of concrete and had gravel shoulders on both sides about ten feet in width. It does not appear in the record how wide the highway was, other than it was a two-lane highway. Some six or seven hundred feet south of the point of collision, there is a dip in the highway that will hide an automobile from the view of a driver approaching from the north. From the evidence of the plaintiff, she was driving about twenty miles per hour immediately prior to the collision. The defendant being called as an adverse witness, testified that he had been driving about sixty miles per hour. According to the plaintiff's evidence, she did not at any time see the defendant's car. The defendant testified that "as I came out of the depression I saw plaintiff's car". According to his testimony, he would have been about six hundred feet from the point of collision when he first saw the plaintiff's car. Plaintiff testified that about two hundred feet from the point of collision, she gave a signal with an outstretched arm for a left turn, slackened her speed and turned into the driveway and was partially off the highway when she was struck about the rear door of her car. The defendant testified that when he saw the plaintiff making a left turn, he applied his brakes, "slid" his tires for a distance of sixty feet and veered to the left. He stated that the plaintiff's car was then headed east and that he struck the car at

The accident occurred on December 22, 1924 at about 3:00 o'clock in the afternoon on Illinois Route 12 about two and one-half miles northwest of Chicago, Illinois. The weather was clear, the road was dry and at the point of collision, was level and straight. The plaintiff was making a left turn into a driveway leading to a floral shop. The highway was made of concrete and had gravel shoulders on both sides about ten feet in width. It does not appear in the record how wide the highway was, when then it was a two-lane highway. There are no signs located east of the point of collision, there is a sign in the highway that will show an approaching car from the view of a driver approaching from the north. From the evidence of the plaintiff, she was driving about twenty miles per hour immediately prior to the collision. The defendant being called as an adverse witness, testified that he was driving about sixty miles per hour. According to the plaintiff's evidence, she did not at any time see the defendant's car. The defendant testified that "as I came out of the driveway I saw plaintiff's car". According to his testimony, he would have been about six hundred feet from the point of collision when he first saw the plaintiff's car. Plaintiff testified that about two hundred feet from the point of collision, she gave a signal with an outstretched arm for a left turn, signalled her hand and turned into the driveway and was partially off the highway when she was struck about the rear door of her car. The defendant testified that when he saw the plaintiff making a left turn, he applied his brakes, "skidded" his tires for a distance of sixty feet and veered to the left. He stated that the plaintiff's car was then headed east and that he struck the car at

a speed of about forty-five miles per hour. The road runs south-westerly and northeasterly at the point of the collision. The defendant testified that he didn't see any sign or arm signal for a turn. The plaintiff testified that before she gave her signal for a left turn, she looked both ways and the highway was clear. The defendant admitted that the radio was playing in his car and that there was no traffic coming toward him, other than the car of the plaintiff. The plaintiff testified that the defendant visited her during the month of April subsequent to the collision and when she asked him how he came to hit her, he replied that he didn't see her until he struck her. This testimony was corroborated by a nurse of the plaintiff and a cousin of the plaintiff, who were present. This statement was denied by the defendant.

From this recital of the salient facts in the testimony, it appears to the court that there was sufficient evidence in the record to raise questions of fact which should have been determined by a jury. If the defendant did not see the car of the plaintiff as the plaintiff and her two witnesses testified he admitted, the jury may have thought this was wilful and wanton conduct. If the defendant's car was hidden in the dip or depression at the time plaintiff made her turn and defendant was driving at such a high rate of speed to reach the point of the collision only six hundred feet from where he had come into view and the plaintiff had given her proper signal as she testified and was unable to get off the road before getting struck while partly off the highway, the jury may have considered this as evidence of wilful and wanton conduct. It seems to us that the trial court was in error in granting the motion for a judgment notwith-

a speed of about forty-five miles per hour. The road was
narrowly and northwesterly at the point of the collision. The de-
fendant testified that he didn't see any sign or light signal for a
stop. The plaintiff testified that before she gave her signal for
a left turn, she looked both ways and the highway was clear. The
defendant admitted that she made her play in the car and that
there was no traffic coming toward him, other than the car of the
plaintiff. The plaintiff testified that the defendant visited her
during the month of April subsequent to the collision and when she
asked him how he came to his car, he replied that he didn't see her
until he struck her. This testimony was corroborated by a nurse at the
plaintiff and a cousin of the plaintiff, who were present. This testi-
mony was denied by the defendant.

From this recital of the salient facts in the testimony, it
appears to the court that there was sufficient evidence in the record
to raise questions of fact which should have been submitted to a
jury. If the defendant did not see the car of the plaintiff at the
plaintiff and if two witnesses testified he admitted, the jury may
have thought this was willful and wanton conduct. If the defendant's
car was within the six or ten feet of the plaintiff's car
at the time and defendant was driving at such a high rate of speed as
to reach the point of the collision only six or ten feet from where he
had come into view and the plaintiff had given her proper signal as
she testified and was unable to get off the road before coming across
with barely off the highway, the jury may have concluded this was
evidence of willful and wanton conduct. It seems to us that the trial
court was in error in granting the motion for a judgment notwithstanding

standing the verdict.

Now we come to the question as to whether or not the trial court should have granted the motion for a new trial. The motion for a new trial is addressed to the sound discretion of the trial court and when granted, such order will be reversed only when it affirmatively appears that there has been a clear abuse of such discretion. Bugdoian v. Union Trust Co., 337 Ill. App. 405, 413; Couch v. Southern Ry. Co., 294 Ill. App. 490. This was undoubtedly a close case on the facts and the trial court sees and hears many things that the reviewing court doesn't have an opportunity to see and hear. The trial court may have properly decided that the preponderance of the evidence was not in favor of the plaintiff and that a new trial should be allowed.

The action of the trial court in allowing the motion for judgment notwithstanding the verdict is therefore hereby reversed and the action of the trial court in the allowing of the motion for a new trial is hereby affirmed.

Reversed in part, affirmed in part and remanded.

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5 I.A.^{2d} 238

MAY CELLINI, as administrator of
the Estate of Paul Cellini, and
STEVE YANKEE,

Appellees,

v.

ELGIN, JOLIET & EASTERN RAILWAY
COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a death action by the administratrix and a personal injury action by Yankee both arising from a collision between his automobile and defendant's train. Verdicts and judgments were for the administratrix and Yankee for \$15,000 and \$10,000 respectively. Defendant has appealed.

About 6:30 A. M. April 11, 1949 Yankee and the decedent, Cellini, fellow employees on the way to work, were driving north on State Street in Chicago Heights, Illinois. As they crossed over the intersection of State Street and a railroad crossing the automobile was struck by defendant's train. The train was diesel powered, eight cars in length and west bound. There were no gates, flagmen or automatic flashing signals at the crossing.

We are concerned only with seven of the eight tracks at the State Street crossing. The northernmost, Michigan Central track was not involved. Beginning at the south there were three Chicago Heights Terminal Transfer R. R. tracks numbered in order 3, 2 and 1. There were then in order Elgin, Joliet and Eastern Ry. storage tracks 2 and 1, the eastbound main and the westbound main.

2. 25 52316

the 1990s, the number of people in the world who are undernourished has declined from 1.1 billion to 800 million. The number of people who are malnourished has declined from 1.5 billion to 1 billion. The number of people who are obese has increased from 100 million to 300 million. The number of people who are overweight has increased from 100 million to 300 million. The number of people who are obese and overweight has increased from 100 million to 300 million. The number of people who are obese and overweight has increased from 100 million to 300 million.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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1950-1951

Figure 6 shows the effect of the initial concentration of the monomer on the polymerization rate. The reaction rate increases with increasing initial concentration of the monomer. This is due to the fact that the higher the initial concentration of the monomer, the more active species are present in the system.

1895

440

• *Staphylococcus aureus* (Staph aureus)

CO. 3000 100000

1941-1942

[illegible]

THE UNIVERSITY OF CHICAGO

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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“GOD” is a *deity*.

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1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that he or she is studying. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that he or she is studying.

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The C. H. T. T. and the E. J. & E. tracks funalled off into a terminal track just east of Wentworth Avenue, two blocks west of State Street. The main tracks curved off to the southwest at about Wentworth Avenue. The C. H. T. T. tracks merged in to a lead track east of State Street. This lead track was a continuation of the southernmost C. H. T. T. track which began to curve to the northeast at the crossing. The lead crossed C. H. T. T. No. 2 just east of State Street and No. 1 further east. The lead joined E. J. & E. storage track No. 1 still further east, beyond the point where E. J. & E. No. 2 had joined No. 1. This arrangement of tracks east of State Street resulted in a triangular pattern, the base being the east side of the State Street crossing.

There were no buildings or trees on either side of the State Street approach to the crossing. Unimproved land lay east and west from State Street.

Defendant's first contention is that there was no evidence of due care on the part of the plaintiffs. On this question we apply the familiar rule and take as true the evidence favorable to plaintiffs and draw the inferences most strongly in their favor, disregarding contrary or contradictory evidence and inferences unfavorable to plaintiffs. Hunter v. Troup, 315 Ill. 293, 296-7; Mahan v. Richardson, 284 Ill. App. 493, 495.

There is testimony that the sun was low on the eastern horizon; that weeds and "stuff" on the east obstructed Yankee's view to the east; that he was familiar with the

E. J. & E. whistles but heard no whistle or bell through the open front wings of his automobile windows; that in the block before the crossing he and Cellini were looking east and west; that "far down" State Street he could see east of the most easterly car; that as he approached the crossing Cellini was "looking to watch out for trains too"; that as he came up to the crossing there were "a good many" box cars scattered on the east and on five tracks on the west; that the cars on both sides came up to within several feet of State Street; that as he was approaching the tracks a man dressed in "regular switchman's clothes" slipped out from between the cars on the west "gave me a motion from south to north with his arm" and "I continued on"; that after plaintiff got on the tracks all he could see was the "dead heads" of the box cars; that as he was "going along there" he was looking east, saw no train from that direction, heard no siren or warning of an approaching train; and that he remembered nothing after he got to the fifth track until 17 days later.

Defendant argues that Yankee's¹ testimony lacks the "guaranty of testimonial truthfulness." Yankee testified that it was about six months before he remembered anything of the accident; that during that time he drove across the crossing as he had previously done and discussed the accident with friends; that details of the accident began to recur and "it took about a year" before he remembered all the details he testified to; that he first remembered picking up

Cellini the day of the accident; and that he then remembered the cars on the east. He said events returned to his memory about in the order they occurred. The medical testimony showed Yankee suffered a basal skull fracture, a brain hemorrhage and that loss of memory of events leading to an accident varies with the individual. We think defendants argument goes to credibility and not competency and is not pertinent on the main issue of law under discussion.

Schneiderman v. Interstate Truck Lines, 394 Ill. 569, 577.

Taking the testimony favorable to plaintiff as true, the situation of stored cars at the crossing presented what witnesses described as a "tunnel." There was the necessity of crossing, the obstructed view on the approach, the "tunnel" on the crossing, the lack of any warning signal of the trains approach and the motion of the switchman. Faced with these facts, reasonable men could differ as to what was the most prudent course to pursue. We think this testimony is sufficient to take the question of due care to the jury.

The factual situations in Elliot v. Elgin, J. & E. Ry. Co., 325 Ill. App. 161 and Greenwald v. B. & O. R. R. Co., 332 Ill. 627, distinguish them from the instant case. In the Elliot case this court decided there was no showing of circumstances that excused the decedents from failure to look or listen. Here there is evidence of obstruction of Yankee's vision and that he was waved across, a circumstance tending to excuse less caution than would be used were it not

100

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of maintaining the value of the pound at its present level. This has been due to a number of factors, including the fact that the Government has not been able to secure the necessary funds to carry out its policy of maintaining the value of the pound at its present level.

1. The first step is to identify the problem. This involves understanding the current situation and the goals that need to be achieved.

2. The second step is to analyze the problem. This involves breaking down the problem into smaller, more manageable parts and identifying the causes of the problem.

3. The third step is to develop a plan. This involves determining the steps that need to be taken to solve the problem and the resources that will be needed.

4. The fourth step is to implement the plan. This involves putting the plan into action and monitoring progress.

5. The fifth step is to evaluate the results. This involves assessing the effectiveness of the solution and making any necessary adjustments.

present. In the Greenwald case it seemed clear to the court that had plaintiff's servant looked again in the direction of the oncoming train after reaching the first track he would have been warned of the peril. Here Yankee had but 10 feet of unobstructed view before the collision.

Defendant contends there was no evidence of excessive speed; failure to sound the statutory bell or whistle signals; lack of flagman, crossing gates or automobile signals; and of a failure to slacken speed.

With respect to the bell and whistle there is evidence that Yankee was familiar with the E. J. & E. deisel "siren or whistles" and had heard them at his home two miles away; that he had heard the bells two blocks away from the crossing; that the day of the accident he approached the crossing with the two front wings of the car windows open and could hear things outside clearly; that he did not hear a siren or bell; that he would have heard it had it been blown; and that Cellini did not indicate he heard a bell ringing or "any thing like that." There is corroboration of this testimony by witnesses for plaintiff and inferentially by one of the defendant's witnesses. Yankee's testimony has probative force on this issue and it was properly for the jury to determine the weight and credit to be given it. Berg v. N. Y. C. R. R. Co., 391 Ill. 52. We think the question with respect to the bell and whistle was for the jury. We need not consider whether there was evidence of the other charges.

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Defendant maintains that the verdict is against the manifest weight of the evidence on the question of due care and on the point of the sounding of the whistle or bell. The attitude of our Supreme Court on the value of the jury in "our judicial administration" was recently expressed in Kettlewell v. Prudential Ins. Co., 4 Ill. 2d 383. That attitude bears on our consideration of this point.

Defendant contrasts the testimony of its thirteen witnesses, whose duties required them to know the situation east of the crossing with Yankee's "recollection" and the casual observations of the four witnesses produced by the plaintiff. Suffice to say that on the issue of the cars stored at the crossing there was contrariety between the witnesses on one side and those on the other and among witnesses for each side. With respect to the warning signal, Yankee as well as defendant's witnesses had reason to pay "attention"; Janet Mattingly habitually heard the warning and was likely to expect it and one of defendant's witnesses could not remember hearing a bell or whistle. We cannot say the verdict is against the manifest weight of evidence.

Defendant complains of error in the court's refusal to give defendant's instructions No.'s 26, 32, 17, 30, 31, 27, and 28; and in the court's modification of defendant's instructions No.'s 13 and 17.

Instruction No. 26 stated that the jury should not be influenced by newspaper articles "upon any matter in controversy here" or by accounts of awards in other trials or by

reports of other settlements or judgments. The court properly refused on the grounds that it knew of no newspaper or other accounts of the case and that no other matter was relevant. We think the court was right in its opinion that cautionary instruction No. 2 was sufficient on this point.

Instruction No. 32 stated defendant had no absolute duty to maintain a flagman, gates or signals at the crossing and their omission was not in itself negligence; that exclusive jurisdiction to order these safety devices was in the Illinois Commerce Commission; that defendant was not ordered to maintain these safety measures and in the absence of an order only the duty of ordinary care and caution under the circumstances arose. We think this instruction is not clear upon the element of "special conditions creating special dangers." Opp v. Pryor, 294 Ill. 538, 541.

Instruction No. 17 stated that defendant had the right to operate its train at the time and place "at any rate" consistent with safety of the train and persons lawfully on the crossing who were exercising due care. The court added "and consistent with conditions existing at such crossing." Variable factors at crossings should be considered in determining the question of negligence in speed. Applegate v. Chicago & N. W. Ry. Co., 334 Ill. App. 141. We think the language added did not imply the court assumed there were box cars obstructing the view of Yankee and Cellini. This distinguishes Rudd v. Holmes, 198 N. C. 640, an automobile case where a vital fact was assumed.

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Instruction No. 30 stated trainmen had no duty on nearing the crossing to slacken speed to avoid the collision though they could have done so in time to avoid the collision, but that Yankee had the duty to stop, "in obedience to custom" and not attempt to cross in front of the train. Instruction No. 31 stated the trainmen had a right to presume Yankee would refrain from going onto the track in front of the train or putting himself in a place of danger and had no duty to try and stop or slacken speed until it was apparent Yankee would not heed the train signals, "if you believe the signals were given."

Defendant argues that instruction No. 30 is justified under Robertson v. N. Y. C. R. R. Co., 388 Ill. 580. In that case there was nothing to obstruct the view of plaintiff. Carrell v. N. Y. C. R. R. Co., 384 Ill. 599 is also distinguished on the same point. There a pedestrian had a clear view. In these cases instruction No. 30 applied while in the instant case the evidence of obstructions makes it inapplicable. We think the court did not err in refusing to give Instruction No. 31. The first clause implies that Yankee went on the track in front of the train and put himself in danger carelessly and it also eliminates the necessity that the trainmen watch for obstructions, if any, at the crossing.

The court refused to give defendant's instruction No. 27 which stated that if the jury believed Yankee could have avoided the collision by ordinary and reasonable use of his faculties and failed to do so and this contributed

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Journal of Management Studies, 20(6), 791-804.

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to the collision he could not recover. The court also refused to give No. 28 to the effect that plaintiffs had the burden of showing they were in the exercise of due care and that if either failed to meet the burden the verdict should be for the defendant. Instruction No. 13 refers to an unobstructed view provided the jury believed that as Yankee's car entered the crossing there were no railroad cars east of State Street. The court deleted the limitation to obstructions from railroad cars.

Instruction No. 27 was properly refused since it ignored the testimony of the misleading wave of the man "dressed like" a switchman. Humbert v. Lowden, 385 Ill. 437; Smith v. Illinois Cent. R. Co., 343 Ill. App. 593. Separate instructions had been given on due care and although not as specific as No. 27 there was no necessity to give No. 27, nor No. 28 and the last part of No. 28 was misleading. The court properly deleted the box car language since the implication was that the cars were the only obstruction testified to.

Instruction No. 29 was tendered after the deletion in No. 13. It stated that a crossing was a place of known danger and Yankee and Cellini had the duty to approach the crossing with "mind and senses alert to the possible danger" and look and listen at places that would be effective. This is an involved, unclear instruction and disregards also the element of the misleading invitation to cross.

We have considered all contentions raised, find no basis for disturbing the judgment and it is accordingly affirmed.

JUDGMENT AFFIRMED.

LEWE AND FEINBERG, JJ. CONCUR.

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LOLITA MILLER,

Appellant,

v.

CARL MILLER,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing her action for divorce. The record discloses that plaintiff's complaint for divorce on the ground of cruelty and defendant's answer thereto were set down for hearing by stipulation of the parties, to be heard as a default matter. At the hearing the parties were present in person as well as by their counsel. Upon the evidence heard a decree was entered April 28, 1953, granting plaintiff a divorce and the custody of the minor child of the parties; and directing defendant to pay \$15 per week for the support of the minor child until the further order of the court. The decree specifically recites that plaintiff waived alimony in open court, and decreed that she be forever barred from seeking any further alimony or support from defendant. The decree bars the parties from asserting any future claim, right, title or interest in and to the property of each other.

On September 28, 1953, defendant filed his motion and petition to vacate the decree entered April 28. Plaintiff was ruled to answer, and the hearing thereon set for October 13. Plaintiff filed a written motion to dismiss the

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petition to vacate the decree, alleging the court was without jurisdiction; that the petition failed to set out a meritorious cause of action; and that defendant was guilty of laches. Upon a hearing of the petition and motion to dismiss the court denied the motion to dismiss the petition and entered an order on November 24, 1953, reciting that the court heard evidence, oral and documentary, finding that it has jurisdiction of the subject matter and the parties, and vacating the decree entered April 28, 1953.

The evidence heard by the court on the petition to vacate the decree is not preserved in the record. We must therefore presume that the evidence heard was sufficient to sustain the charge of fraud upon the court in the original hearing for divorce, as alleged in said petition. Jaffe v. Tenenholtz, 333 Ill. App. 357; Ferro v. Daros, 343 Ill. App. 267 (Abst.); A. B. C. Loan Co. v. Campbell, 1 Ill. App. 2d 297 (Abst.).

The record further discloses that following the entry of the order vacating the decree, plaintiff filed her petition asking for alimony for her support and maintenance as well as attorney's fees. The petition for alimony was reserved for hearing until the trial of the cause. On November 30, 1953, an order was entered reciting: "On motion of attorney for Plaintiff and defendant and defendant's attorney being present in open court, Ordered that the above entitled cause be set for trial as a contested matter, December 29, 1953." The cause was regularly called for trial on the latter

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date. Plaintiff refused to offer proof and to proceed with the trial, whereupon the court dismissed the complaint for want of prosecution. It is from this order the present appeal is prosecuted.

Upon this state of the record plaintiff must be held to have waived whatever right she had originally to question the jurisdiction of the court to vacate the decree. Groves v. Illinois Publishing and Printing Co., 327 Ill. App. 544, and cases there cited; Hankins v. DePue, 331 Ill. App. 180 (Abst.). In Wilson Bros. v. Haege, 347 Ill. 140, 143, the court said:

"While lack of jurisdiction of the court as to the subject matter cannot be waived, yet the method by which jurisdiction of a particular case within the general class of cases is obtained, and any differences or irregularities in respect thereto, may be waived, and is waived unless reasonable objection is made in accordance with the established practice."

As to the question of waiver of the right to attack the jurisdiction of the court, the holding in Tree v. DeMar, 2 Ill. 2d 547, 558, is applicable to the instant case. In the case cited, the jurisdiction of the Appellate Court to entertain an appeal in a matter claimed to involve a freehold was raised for the first time in the Appellate Court in a petition for rehearing (Tree v. Continental Ill. Nat. Bank & Trust Co., 346 Ill. App. 509). Because the appeal was taken to the Appellate Court instead of the Supreme Court, where no motion was made to transfer the case to the Supreme Court on the ground of lack of jurisdiction, and because of the failure to raise the point until the petition for rehearing, the right thereafter to question the jurisdiction of the Appellate Court was held to have been waived.

The order appealed from is affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

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1947

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46475

MACHINERY FINANCE CORPORATION,
a corporation,

Appellant,

v.

MAX LIRTZMAN,

Appellee.

5 I.A.^{2d} 239
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered on August 21, 1953, for \$4,704.50, upon a note containing the usual clause for entry of judgment by confession. On September 25, 1953, defendant filed a petition to vacate the judgment, alleging want of consideration and usury. On the same day an order was entered by agreement, confirming the judgment except as to the amount of alleged usury, and reciting the plaintiff's right to enforce said judgment in the sum of \$3,233.52 was not to be affected by said order, and opening up the judgment for hearing as to the balance.

On October 19, 1953, defendant filed his answer, setting up lack of consideration, and that plaintiff was not a holder in due course but had knowledge of all the circumstances entering into the execution of the note. On October 28, 1953, by agreement of the parties the judgment in the sum of \$3,233.52 was again confirmed, thereby reducing the original judgment by the amount of the alleged usury.

The record discloses that on February 18, 1954, defendant filed another petition to vacate the judgment, alleging that he did not learn until February 12, 1954, of

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the fact of a conspiracy existing between plaintiff and the original payee of the note, which had been assigned to plaintiff; that plaintiff exchanged checks with the original payee to make it appear that plaintiff paid consideration for the note; that plaintiff was not a bona fide holder but had knowledge of all the circumstances; and that there was no consideration passing from plaintiff to the payee.

Plaintiff filed a written motion to strike the latter petition, alleging lack of jurisdiction of the court; reciting that the judgment had been entered by consent, and that there was no fraud, duress or imposition on the defendant involved in his consent to said judgment order. The motion to strike was denied, and the judgment was vacated. It is from this order plaintiff appeals.

We have not the benefit of a brief for defendant.

The instant judgment was entered by consent, and under the settled rule of law governing the jurisdiction of the court in such instance, the court lacked jurisdiction to set aside the instant judgment upon the petition filed by defendant.

In Sims v. Powell, 390 Ill. 610, the court held:

"The law is firmly established that where parties who are competent to contract agree to the rendition of a judgment or decree with respect to any subject which may be the subject of litigation, the final order, when entered, is by consent. Moreover, a consent decree is not a judicial determination of the rights of the parties as it does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent cannot be reviewed by appeal or writ of error and can only be set aside by an

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original bill of review. * * * Plaintiff enjoyed the right to consent, if he so elected, to the order in the form in which it was entered, and, when entered, it became immune to subsequent challenge by him. The error, if any, in entering the order was the error of the parties and not of the court. * * * Manifestly, plaintiff cannot succeed in his indirect attack upon the order of October 19, 1943, when a direct assault would have been futile, and, particularly, since he was benefited by the provision in the order of November 16, 1943, for the payment of \$1000 to him."

Accordingly, the order appealed from is reversed.

REVERSED.

KILEY, P.J. AND LEWE, J., CONCUR.

The first of these is the fact that the
 government has been unable to raise the
 necessary funds to meet its obligations.
 This is due to a number of factors, including
 the fact that the government has been unable to
 collect the necessary taxes, and the fact that
 the government has been unable to borrow the
 necessary funds from the international market.
 The second factor is the fact that the
 government has been unable to implement the
 necessary reforms to the economy. This has
 led to a situation where the government is
 unable to generate the necessary revenue to
 meet its obligations.

46408

ACE MATCH CORP.,

Appellee,

v.

CONSOLIDATED-MODERN PRESS, INC.,

Appellant.

107 A
5 LA^{2d} 210
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action for goods sold and delivered to defendant in the sum of \$1,620.29 and interest amounting to \$81.01. Defendant filed a defense to a portion of plaintiff's claim and a counterclaim alleging actual damages in the sum of \$25,000 and exemplary damages. The trial judge directed the jury to return a verdict for plaintiff in the sum of \$1,701.30 and dismissed defendant's counterclaim. Defendant appeals.

As grounds for reversal defendant urges that the trial court erred in denying defendant's motion for a continuance and its petition for a change of venue.

This action was instituted in May 1951 and on October 29, 1953 the cause was assigned to Judge Hermes by whom the order here appealed from was entered. Before the cause reached Judge Hermes numerous continuances were granted and orders entered by five other judges. The proceedings had before the other judges are not relevant to the issues presented here.

December 7, 1953 a judgment was entered in favor of the plaintiff for \$1,701.30 and an order dismissing

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization. This section also outlines the various methods used to collect and analyze data, ensuring that the information is reliable and up-to-date.

2. The second part of the document focuses on the implementation of the proposed changes. It details the steps involved in the process, from the initial planning stage to the final execution. This section also addresses the potential challenges that may arise during the implementation phase and provides strategies to overcome them.

3. The third part of the document discusses the impact of the proposed changes on the organization. It highlights the expected benefits, such as improved efficiency and cost savings, and also addresses the potential risks and drawbacks. This section also provides a timeline for the implementation of the changes, allowing the organization to prepare accordingly.

4. The fourth part of the document discusses the future of the organization. It outlines the long-term goals and objectives, and provides a vision for the organization's future. This section also discusses the role of the organization in the community and the environment, and the importance of sustainable development.

5. The fifth part of the document discusses the conclusion of the project. It summarizes the key findings and recommendations, and provides a final assessment of the project's success. This section also discusses the next steps and the ongoing monitoring and evaluation process.

defendant's counterclaim. On the same day defendant made a motion to vacate the judgment and the order dismissing its counterclaim. This motion was continued to December 9th. December 9, 1953 the trial judge overruled defendant's motion to vacate the judgment entered December 7th and reduced the judgment to \$1,620.29 and costs. December 24th the defendant and cross-plaintiff filed a written motion to vacate the orders entered on December 7th and 9th and to set the cause for trial in February 1954. Accompanying this motion were affidavits executed by defendant's counsel, Mr. David F. Silverzweig, Charles G. Meyerson, secretary of the defendant corporation, and his physician Dr. Nicholas I. Fox, which stated in substance that Meyerson was an indispensable witness and was suffering from a serious heart ailment. The trial court overruled defendant's motion. December 29th defendant again appeared before Judge Hermes and made a motion to reconsider defendant's motion of December 24th. That motion was granted and an order was entered vacating the orders theretofore entered on December 7th and 9th, 1953, and setting the cause for trial on January 5, 1954.

The record shows that defendant filed a jury demand in apt time and that notwithstanding the jury demand judgments were entered on December 7th and 9th without impaneling a jury.

Pursuant to notice served on plaintiff January 4, 1954, defendant presented a petition on January 5, 1954, in proper form, for a change of venue, stating that knowledge of the prejudice of the trial judge first came to the defendant on December 29, 1953.

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The record further shows that when the cause was called for trial on January 5th defendant's counsel stated: "I have a petition to present." The trial judge replied: "Call about twelve jurors. Your petition is dismissed." Defendant's counsel at that time not having had an opportunity to present his petition for change of venue, plaintiff's counsel, Mr. Greenberg, interposed: "Judge, let him present his petition." The petition for change of venue was then presented to the court and was summarily denied. Immediately upon the denial of the petition for change of venue, defendant's counsel announced to the court that he would not participate in the trial. The verdict and judgment followed.

We shall consider defendant's contentions in the inverse order in which they were presented in the brief. The law is well established that a petition for a change of venue must be made at the earliest practicable moment. (Commiss of Drainage Dist. v. Goembel, 383 Ill. 323.)

Defendant says that the order setting the cause for trial on January 5, 1954 was entered on the afternoon of December 29, 1953. Only two days remained in the calendar year of 1953 and on the following three days, January 1st, 2nd, and 3rd, no business was transacted in the courts. Notice of the petition for change of venue was served on plaintiff on January 4th, that being the first business day of the new year.

In Hassell v. Backers, 341 Ill. App. 290, on which plaintiff relies, this court held that a petition for a change of venue was not filed in apt time for the reason that more

than a full week elapsed after defendant had learned of the prejudice of the trial judge, before he filed his petition. Neither that case nor Juckins v. Professional Service Corp., 318 Ill. App. 368, is helpful, because the facts are dissimilar.

In the instant case the defendant presented his petition immediately at the opening of court and before the hearing had started (Lionel Corp. v. Central Appliance & Furniture Co., Inc., 3 Ill. App. 2d, 460.) Under the circumstances shown by this record, we think the petition for a change of venue was presented at the earliest practicable moment. We are, therefore, of the opinion that the trial judge erred in denying the change of venue.

Since all proceedings subsequent to the denial of defendant's petition for change of venue are void, it is unnecessary to consider the other question presented.

For the reasons stated, the order entered January 5, 1954 dismissing defendant's counterclaim, and the judgment in favor of the plaintiff and against the defendant, are reversed. The cause is remanded for a new trial and with directions to grant a change of venue.

ORDER AND JUDGMENT REVERSED
AND CAUSE REMANDED FOR A NEW TRIAL.

KILEY, P.J. AND FEINBERG, J. CONCUR.

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between the parties whereby appellant would furnish siding for the dwelling house owned by appellees. The appellant was unsuccessful in his effort to enforce a mechanic's lien and that action was dismissed for want of equity.

Although appellees have elected not to file a brief on this appeal, it was apparently their contention in the court below that the prior action for enforcement of a mechanic's lien bars appellant's action, at law, for damages on the contract. Thus, the sole question involved in this appeal is whether or not the appellant is barred, by reason of the dismissal of his suit for enforcement of mechanic's lien, from later seeking in this proceeding a recovery at law on the same contract.

There is no question that the right to a mechanic's lien is purely statutory; further it has been consistently held by our courts that the mechanic's lien is a cumulative remedy. It is additional to the other remedies given by the common law for the enforcement of the contract out of which the lien arises.

In Rockwood Sprinkler Co. vs. Phillips Co., 265 Ill. App. 267, the plaintiff sued for amount due under a certain contract for the installation of a sprinkler system. One of the pleas of the defendant was res judicata for the reason that a mechanic's lien proceeding had previously been instituted. The court held that there was no merit to that contention and in so doing the court said:

"A mechanic's lien proceeding is in the nature of a proceeding in rem. The proceeding, under the statute, is additional or cumulative of such other remedies for the enforcement of the contract out of which the lien arises, as the party may have either against the person or property. Independently of the lien given by the statute, a creditor may enforce his contract in any appropriate common law action, but can have one satisfaction only. (Citations omitted). It is obvious that the mere fact that the plaintiff failed to enforce a mechanic's lien against the property would not bar the instant action."

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In H. G. Wolff Co. vs. Gwynne, 246 Ill. App. 86, the Court said (91):

"The Mechanic's Lien Law does not affect, and is not in derogation of, the common law or equity rights of the parties. It merely undertakes to provide an additional remedy; the contractual obligations of all parties still subsist to the full; their substantive rights remain and may be enforced as before."

In 1903 the legislature attempted to provide the courts with power to enter a personal decree or a money judgment in a suit to enforce a mechanic's lien. However, in Turnes vs. Brenckle, 249 Ill. 394, our supreme court declared that this portion of the Mechanic's Lien Law was unconstitutional for the reason that it was special legislation. Consequently, the case of Turnes vs. Brenckle has been cited consistently as authority for the principle that failure to obtain relief by enforcement of a mechanic's lien does not preclude the materialmen from later pursuing the remedy afforded him at law on his contract.

This rule has survived the adoption of the Civil Practice Act which provides that causes of action in equity and at law may be joined in the same suit. However, the substantial distinctions of actions in equity and suits at law still remain, and in this instance the record is void of any showing that the prior adjudication involved anything other than appellant's right to enforce a mechanic's lien. Thus, the earlier proceeding was statutory and unaltered by the adoption of the Civil Practice Act.

This court has had a similar case before it in Standard Oil Co. vs. Kapschull, Davis Co., Inc. et al, 276 Ill. App. 281. In that case a subcontractor sought to enforce a mechanic's lien upon monies due from the state of Illinois upon a road contract. The primary question involved was whether or not the Mechanic's Lien law applied in that particular instance. In addition, there was a question of whether or not the corporate surety could be

found liable on its bond in a mechanic's lien proceeding. This Court said: (286)

"This holding is not authority for the proposition that in the proceeding the lower court, even though a lien be denied appellee, should have determined the rights of appellee upon the bond executed by appellant. The statutory belief sought by appellee (Mechanic's lien) cannot be granted because under the construction of the statute as adopted in the Cober Case, *supra*, one who furnishes supplies to a subcontractor is not entitled to a lien upon the funds in the hands of the state. This relief having been denied appellee, all that was left to be ascertained and adjudicated were legal rights and the lower court erred in not dismissing the bill and leaving appellee to pursue his legal remedies. Independent of any statute, a personal decree is not authorized in this State where an unsuccessful effort to establish a lien has been made." Turnes vs. Brenckle, 249 Ill. 394, at page 208 the court continued, "It is insisted that a court of equity having obtained jurisdiction in this case will retain it in order to do complete justice between the parties, that appellant submitted itself to the jurisdiction of the trial court without insisting that appellee had an adequate remedy at law, and therefore that portion of the decree of the lower court fixing the liability of appellant upon its bond should be affirmed." Section 23 of the Liens Act gave the original contractor an additional remedy for enforcing obligations which did not previously exist and under the authorities, where no statutory relief is granted or equitable relief warranted, the proceedings must be dismissed leaving complainant to pursue its legal remedies, if any."

To the same effect is Illinois Malleable Iron Co. vs. Model Plumbing Co., 176 Ill. App. 263, wherein the appellate court, First District, said: (266)

"If plaintiff was entitled to a judgment as in the case of default, it was entitled only to the judgment permitted by the Mechanic's Lien Act. We also are unable to understand by what rule such a personal judgment could be rendered against the defendant Tompary, where the only evidence before the court is a claim for a mechanic's lien."

In Novak vs. Kruse, 211 Ill. App. 274, the paramount question before the court for determination was whether or not the claimant was entitled to a money decree in a proceeding brought under the Mechanic's Lien Act. In this instance the Court found that the provision of the Mechanic's Lien Act of 1903 which authorized money judgments in a mechanic's lien proceeding was unconstitutional; further it determined that the Court had no jurisdiction of the subject matter where there is no right to a

lien and, consequently, the Court would have no authority to enter a money decree. In Erikson vs. Ward, 266 Ill. 259, the plaintiff had filed a claim based upon a building contract. The defendant denied plaintiff's demand by filing a motion to dismiss the suit and assigned as a reason therefor that the plaintiff had instituted a mechanic's lien proceeding against the defendant for the same amount claimed in that action. The motion to dismiss was denied and one of the errors assigned on appeal was the court's action in overruling defendant's motion to dismiss on account of the pendency of the mechanic's lien suit. The court said: (266)

"The court did not err in overruling defendant's motion to dismiss or abate the suit in this case on account of the pendency of the mechanic's lien suit. They were concurrent remedies, and a recovery and satisfaction in one case would operate as a bar to the other. Templeton vs. Horne, 82 Ill. 491; West vs. Fleming, 18 Id. 248; Delahay vs. Clement, 3 Scam. 201."

The appellant, in his brief, states other propositions of law to support his position that the judgment of the circuit court of Winnebago County is erroneous. In view of the holdings of the authorities cited, the primary question on this appeal can be determined without consideration of the other propositions.

The law is well settled that a suit in equity to enforce a mechanic's lien will not bar an action at law for the enforcement of the contract out of which the lien arose, the only limitation being that there be one satisfaction only. Since it does not appear that there has been a satisfaction of appellant's claim, the judgment order appealed from will be reversed and this cause remanded to the circuit court with directions to overrule defendant's motion to dismiss and proceed in conformity with this opinion.

Reversed and remanded with directions.

Abstract

72 A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1955.

5 I.A.^{2d} 370

General No. 9969

Agenda No. 9

Sam H. Wilkins,
Plaintiff-Appellee,

vs.

Appeal from
Circuit Court of
Coles County

Benevolent Protective Order of
Elks, Lodge No. 623, Charleston,
Illinois, a Corporation,
Defendant-Appellant.

REYNOLDS, J.

This case grows out of an accident in the club rooms of the defendant corporation, on August 31, 1951. The defendant corporation, hereinafter called the Elks Club, operated, possessed and controlled certain rooms on the second floor of a building in Charleston, Illinois. The plaintiff was a member in good standing. There was one room called a reading and club room and sometimes referred to as a card room. On the day of the accident, the janitor of the defendant had mopped and cleaned the floor of the reading and club room and after mopping and cleaning, had applied liquid wax to the floor. The testimony showed that the wax was one that required about an hour to dry. After cleaning, mopping and applying the wax to the floor of this room, the floor being a wooden floor, the janitor then took his mops, buckets and supplies and went to a supply room, which was in another part of the building, to store them. He was gone a few minutes and according to his testimony, his intention was

to go back and close the door. While the janitor was putting up his supplies, the room in question was dark in that the electric lights were turned off and the venetian blinds on the windows were so arranged as to shut out the light. During the short interval that the janitor was away from the room, the plaintiff walked into the room and fell. The plaintiff at that time was 72 years of age, apparently had good eye sight and was in reasonably good physical condition. He was seriously injured. It is a little difficult from the testimony to determine the relation of the various rooms of the club itself, but there seems to be no question that this room in which the plaintiff fell was used as a card room or game room by members from time to time. There was a place to leave hats and clothing, two or three card tables with chairs, a divan or davenport, and off of it, a toilet. The room was rather large, 20 x 35 feet, with two or three windows. The plaintiff had been in the habit of going to the Elks Club and into this room and the other rooms of the club almost daily for six years. On the day of the accident he had entered the room with the intention of hanging up his hat. He was then going to go to another club room and get some soup and cigars, these commodities being for sale by the club with other items.

It is undisputed that there was a standing order to the janitor that when he waxed a room, that he should put up a chair or close the door so as to warn the members and in this particular case the janitor, according to his testimony, intended to go right back after storing his supplies and equipment and close the door. The case was tried before a jury in the Circuit Court of Coles County and a verdict was rendered by the jury in favor of the plaintiff and against the

defendant, assessing damages at \$15,000.00. The defendant then filed a motion for a judgment notwithstanding the verdict and for a new trial. The trial court overruled both motions and entered judgment in favor of the plaintiff and against the defendant for \$15,000.00 and costs. The case now comes to this court on appeal to reverse the judgment on said verdict or in the alternative for an order for a new trial.

The defendant in its appeal raises four points, namely, (1) that the plaintiff was guilty of contributory negligence, (2) that waxing of the floor in the usual customary manner is not negligence per se, (3) that certain instructions were error and (4) that the only duty the defendant owed to the plaintiff was to refrain from knowingly or intentionally inflicting injuries on the theory that the plaintiff was a licensee, or if an invitee, the only duty the defendant owed to the plaintiff was to keep the premises in a reasonably safe condition.

Taking up the first contention of the defendant, namely, that the plaintiff was guilty of contributory negligence as a matter of law upon entering a darkened room, knowing conditions and failing to use precautionary means. This position is not supported by the facts. The plaintiff himself testified that when there was a reason for members not to go into certain rooms, such as waxing floors, that they would close the door and put a chair in front of it. This is supported by testimony of officers and former employees of the club that there was a standing order to close the door and place the chair as a warning, while wax was drying. The plaintiff also testified that the tables and chairs were in the

1. This is supported by testimony of witnesses who have seen the
 2. person at the time that there was a meeting held in the
 3. room and place for which he was arrested, while he was in the
 4. room. The witness himself testified that when he was in the
 5. room for several days he had seen the person, and he stated
 6. that, when they would come into the room and see a person in the
 7. room, that they would come in and see a person in the room.
 8. The witness himself testified that when he was in the
 9. room for several days he had seen the person, and he stated
 10. that, when they would come into the room and see a person in the
 11. room, that they would come in and see a person in the room.
 12. The witness himself testified that when he was in the
 13. room for several days he had seen the person, and he stated
 14. that, when they would come into the room and see a person in the
 15. room, that they would come in and see a person in the room.

usual places in the room, and that it was somewhat dark in the room itself. He testified that he had been in the room at other times when the lights were off and the blinds were closed. Just how dark it was in the room must have been considered by the jury in reaching their verdict. In these modern times everyone is familiar with venetian blinds and how they screen out the light.

This question of contributory negligence would seem to this court to be a matter for the jury to pass on. One of the best statements of law concerning a matter of this kind was made by the court in Berg v. New York Central R. R. Co., 391 Ill. 52 at page 63, where the court there said: "Courts are not at liberty to say, as a matter of law, that one must conduct himself in a particular manner and observe a certain line of conduct in each case and under all conditions. Negligence does not become a question of law alone unless the acts constituting it are of such a character that all reasonable men would concur in pronouncing them so. Human conduct must be judged by human standards."

In the case of Denny v. Goldblatt Bros., Inc., 298 Ill. App. 325 at page 333, the court there said: "Even where the facts are admitted but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the question of negligence ought to be submitted to the jury. It was for the jury to draw the inference. Chicago & N. W. Ry. Co. v. Hansen, 166 Ill. 623; Moore v. Rosemond, 238 N. Y. 356, opinion by Judge Pound; Kavale v. Morton, 242 Ill. App. 205; Norris v. Illinois C. R. Co., Salt Co., 88 Ill. App. 614; Richmond & D. R. R. Co. v. Powers, 149 U. S. 43; Gunning v. Cooley, 281 U. S. 90."

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¹⁰ *Journal of the American Medical Association*, 279 (1997), 1000-1001.

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

THE UNIVERSITY OF CHICAGO

Defendant cites a number of cases in which contributory negligence was held as a matter of law. An examination of those cases shows almost gross carelessness on the part of the plaintiffs in each case. The case of Arrett v. Century Petroleum, Inc., 102 Ill. App. 99, was a case where a car owner went to a filling station to have minor repairs made to her car. While there, she went to the ladies' room, going through the office to get to the ladies' room. Her car at that time was parked on the outside of the building and remained there at all times while repairs were made. She was a stranger to the filling station and the buildings adjacent thereto. She went in one door, but when she was ready to come out, she testified the door by which she had entered was closed, so she went into a darkened room and fell into a grease pit. She testified she could not see where she was walking and the only light in the building was the reflection from the office lights on a car parked in this building. The court held in that case that the plaintiff was an invitee to the defendant's office and wash room but that she was not an invitee to the room where the grease pits were. The court held that giving the plaintiff the full benefit of her evidence and the law applicable thereto, that it was forced to the conclusion that her injuries resulted from her gross carelessness at the time of the accident and immediately prior thereto.

The case of Swanson v. Schoenhofen, 215 Ill. App. 185, was a case where a bartender was employed at his brother-in-law's saloon in Chicago. He had worked in this saloon for two years and seven months previous to his death. The defendant supplied beer to the saloon. The bartender suffered injuries which resulted in his death

by falling through the trap door, after going into a darkened room without turning on the lights and walking into the open trap door. The court in that case held that the man must have been familiar with the entire surroundings, that he knew the danger and that the accident resulted from his entire lack of ordinary care for his own safety.

In Hart v. Sullivan, 324 Ill. App. 243, the deceased had accompanied an acquaintance to the home of one Donati. The deceased himself was only doing a favor in showing this acquaintance where Donati lived. Donati lived on the third floor of the defendant's building. To reach Donati's quarters, it was necessary to go up three flights of steps. The deceased, with the acquaintance, went into the building and lighting a match, found the address on the mail box. Then the deceased, walking in pitch darkness, went up the stairs and instead of going upstairs to Donati's quarters, pushed open another door and fell down a stairway leading to the basement. It was contended there that the deceased was only a licensee and not an invitee and the court held that the actions of the deceased in ascending the steps, crossing the first landing and going in total darkness to the place he fell, was contributory negligence as a matter of law. While he specially concurred in the decision, Justice O'Connor in his concurring opinion again sets forth with clarity the law governing this case. "It has often been stated by this and some other courts that where there is no dispute in the evidence, the question is one of law for the court to decide. And in Sauter v. Hinde, 183 Ill. App. 413, cited in the opinion, the court said: 'There is no dispute about the facts concerning her care and caution and the case rests solely upon her statements and the

surrounding circumstances, that are not in dispute, as to whether she was exercising such care, and under such state of facts it becomes the duty of the court to determine as a matter of law as to whether she was in the exercise of such care.' And in Costello v. Farmers' Bank of Golden Valley, 34 N. D. 131, 157 N. W. 982, the Supreme Court of North Dakota said: 'While the question of contributory negligence is usually one of fact for the jury, yet where - as in the case at bar - the facts are not in dispute it becomes a pure question of law for the court.' There is no such orthodox rule. The language quoted from the two cases would be a correct statement of the law if but one reasonable conclusion could be drawn from the undisputed evidence. But where different conclusions might reasonably be drawn from the undisputed evidence, the question is one for the jury and not one of law for the court.

"In the instant case I am of ~~xxx~~ opinion that two reasonable conclusions could be drawn from the undisputed evidence - one to the effect that the deceased was guilty of contributory negligence and another that he was not. But it was for the jury to draw the conclusions. Chicago & N. W. Ry. Co. v. Hansen, 166 Ill. 623; Best v. District of Columbia, 291 U. S. 411; Flodzien v. Segool, 314 Ill. App. 40; Turner v. Cummings, 319 Ill. App. 225." ^{***}

The matter of submitting the question of contributory negligence to a jury, has been set forth time and time again by the Supreme and Appellate courts of this State. In a very recent case, Thomas v. Douglas, 1 Ill. App. 2d 261 at page 265, the court there said:

"The question of contributory negligence is preeminently for

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James E. Sullivan, 1111 Ave. 44, Box 585, New York 17, New York, and associate counsel of said firm, in a letter dated 1944, advised that he had been advised by the

consideration ^{of} the jury as such negligence cannot be defined in exact terms, and unless it can be said that the action of the injured person is clearly and palpably negligent it is not within the province of the court to substitute its judgment for that of the jury. Blumb v. Getz, 366 Ill. 273; Moffitt v. O. L. D. Forwarding Co., 331 Ill. App. 278." And again, on page 266 of the Thomas v. Douglas case, the court said: "In our view the facts in the Hart case and other cases relied on by defendant are clearly distinguishable from this case. The governing principle has been clearly stated in Dively v. Penn-Pittsburgh Corporation, 332 Pa. 65, where the court classified cases of this type into two groups. The court said, at page 69: 'There are those in which a person wanders around in a place absolutely dark and where, though not a trespasser, there is no reasonable necessity for his presence. In such cases recovery is denied. There are other cases where there is some fairly compelling reason for walking in a place which, though dark, is not utterly devoid of light. Under such circumstances contributory negligence will not be declared as a matter of law.' "

Under the circumstances of this case, we believe that the matter of contributory negligence was a question for the jury. Because of previous practice the plaintiff had a right to expect that if the floor was waxed or that any danger existed or any reason for him not to enter the room where he was injured, that the door would have been closed and a chair put up as a warning. It is true that the janitor intended to do this as soon as he got back from the supply room but he did not put up the warning chair or close the door. The question of darkness in the room or the degree of darkness would seem

to be a question of fact. The plaintiff testified he could see the tables and chairs and that the room appeared the same as usual, or words to that effect. All these matters present questions that a difference of opinion may exist as to the inference that may be drawn from them and these questions are properly questions that must be answered by the jury.

The next point raised by the defendant is that waxing of the floor in the usual customary manner is not negligence per se. The waxing of floors has been held to be a common practice and too well known to be considered negligence in the absence of evidence tending to prove some positive negligent act or omission on the part of the owner of the premises which contributed to the injury. The mere waxing of a floor is not in itself negligence but if the waxing of the floor created a dangerous condition and the defendant knew of this dangerous condition, then failure to exercise reasonable care to the end that the room so waxed would be safe for the benefit of those using the same was negligence. Defendant cites the case of Mack v. Woman's Club of Aurora, 303 Ill. App. 217. Mrs. Mack, an elderly woman, was attending a meeting in the club room of the defendant and slipped and fell on the waxed floor sustaining a broken hip. The floor was a hardwood floor and was kept clean and waxed in a manner common to such floors. It appeared that the plaintiff was familiar with the room and had been going there for about two years. The court in that case held that whatever risks were involved in the use of the waxed floor were obvious ones and such as were evident to each of her former visits to the club room and common to every other member of the club and that under such circumstances she must be held to have assumed any risks involved in her walking

on the floor. The court went on to say that it did not consider it negligence per se for the club to have the club room floor cleaned and waxed nor that such act served to charge the club with the duty of anticipating that one in the exercise of ordinary care would be exposed to danger in using the floor in a manner for which it was intended.

The case of Custer v. St. Clair Country Club, 349 Ill. App. 316, this was a suit growing out of a fall on a ballroom floor. The floor had been waxed for dancing and the testimony showed that the floor near where the plaintiff fell there was a sticky substance which covered an area about one foot square. There was no charge or showing that the defendant had actual notice of the substance or matter alleged to be on the floor or the condition of the floor which caused the plaintiff's fall. The court in that case said, citing Dixon v. Hart, 344 Ill. App. 432, that the mere showing that a floor had been polished, together with some evidence of it being slick did not justify submission of the cause to a jury.

As the court said in the case of Dixon v. Hart, 344 Ill. App. 432, on page 435: "We have concluded from an examination of the law in Illinois as well as in other jurisdictions that as a general proposition the mere treating of a floor with a substance that gives it a polished surface is not negligence per se." Citing authorities. "The cases establish that some positive act of negligence must be shown before recovery can be had, such as: That an excessive quantity of polish was used, that it was applied unevenly, that the floor had been freshly polished and no warning given, that one section of floor

in the time, the court said in its opinion that it was not necessary

to distinguish between the two cases in the time.

There was no error in the court's opinion in the time.

The court's opinion in the time was not in error.

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was waxed or oiled while the remainder was untreated, or that a floor was polished where people would step on it unexpectedly, as, for example, where they would step off of an elevator or a moving stairway or in a dimly lighted room or corridor or on a substantial incline."

It must be admitted that the defendant Elks Club was under a continuing duty to see that the club room was reasonably safe for the uses and purposes to which it was to be put, such duty arising from the rule requiring it to exercise reasonable care to the end that the club room should be safe for the benefit of those using same. Mack v. Woman's Club of Aurora, 303 Ill. App. 217.

In the case of Mack v. Woman's Club of Aurora, 303 Ill. App. 217, the court in its reasoning on page 220 says: "There appears to have been no hidden danger." Was there hidden danger here? If there is any question of this, then it was properly a question for the jury. In the case of Sundberg v. Pool, 320 Ill. App. 138, the plaintiff slipped on some soapy water on the floor. This was held sufficient evidence to sustain verdict for the plaintiff, notwithstanding testimony of employees that no manicures had been given up to the time of the accident and that such water was not used for other purposes. In the case of Denny v. Goldblatt, ^{Bros. Inc.} 298 Ill. App. 325, at page 331, the court said: "Under the law the defendant was required to use reasonable care to see that its premises were reasonably safe for its patrons. Whether the vomitus or milk was in the doorway such a period of time that defendant, in the exercise of ordinary care would have discovered and removed it, ^{x * x} we think was a question for the jury."

All these cases and we think the instant case, rest on the rule of law in Illinois, that negligence does not become a question of law alone unless the acts constituting it are of such a character that all reasonable men would concur in pronouncing them so. Berry v. New York Central R. R. Co., 391 Ill. 52.

In this case these questions of fact have been submitted to a jury and that jury has rendered a verdict. This court in the absence of clear and palpable error will not attempt to substitute its judgment for that of the jury.

The defendant complains of three instructions given for the plaintiff, namely, instructions No. 8, 9 and 22. One of the objections to these instructions is that there is no limitation in the instructions limiting the right of the plaintiff to recover for negligence alleged in the complaint. The courts in Illinois have almost uniformly held that an instruction in a personal injury case which fails to limit the plaintiff's right of recovery for injuries sustained by the negligence of the defendant charged in the declaration is reversible error. Matner v. Chicago City Ry. Co., 233 Ill. 169; Hackett v. Chicago City Ry. Co., 235 Ill. 110; Hackett v. Builders Lumber Co. of Decatur, 253 Ill. App. 107; Lyons v. Myerson & Son, 242 Ill. 409; Seybold v. Zimmerman, 294 Ill. App. 138.

Instruction No. 6 does fail to limit liability to the negligence alleged in the complaint and under the law as laid down by numerous cases both in the Appellate and Supreme Courts, this form of an instruction is reversible error. In the case of Seybold v. Zimmerman, 294 Ill. App. 138, on page 142, the following comparable two instructions were given.

IN THE COURT OF THE DISTRICT OF COLUMBIA
IN RE: THE ESTATE OF JAMES EARL RAY, JR.
DECEASED
JAMES EARL RAY, JR., DECEASED, by and through his
personal representative, JAMES EARL RAY, JR.,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

COMES NOW the Plaintiff, JAMES EARL RAY, JR., and
files this Petition for the appointment of a
personal representative of the estate of JAMES
EARL RAY, JR., DECEASED, and prays that the
Court will appoint him as such representative,
and that the Court will grant him the authority
to administer the estate of JAMES EARL RAY, JR.,
DECEASED, and to take such other and lawful
actions as may be necessary or proper for the
administration of the estate of JAMES EARL RAY,
JR., DECEASED.

WHEREFORE the Plaintiff prays that the Court
will grant him the appointment of personal
representative of the estate of JAMES EARL RAY,
JR., DECEASED, and that the Court will grant
him the authority to administer the estate of
JAMES EARL RAY, JR., DECEASED, and to take
such other and lawful actions as may be
necessary or proper for the administration of
the estate of JAMES EARL RAY, JR., DECEASED.

VERIFIED and sworn to before me this 1st day
of May, 1971, at Washington, D.C.

Notary Public for the District of Columbia

"1. The court instructs the jury that if you believe from a preponderance of the evidence in this case that the plaintiff, Bernice Seybold, was injured in a collision between a truck being driven by the defendant, Peter Jacob Zimmerman, and a truck in which the said plaintiff was then riding, and that at the time the said plaintiff received such injury she was in the exercise of ordinary care and caution for her own safety, and that her injury was caused by the negligence of the defendant, then you should find the issue for the said plaintiff, Bernice Seybold, and assess her damages at such sum of money as you believe, from a preponderance of the evidence, will be a fair and just compensation to said plaintiff for the damages so sustained by her, not exceeding the amount claimed by said plaintiff in the complaint."

"2. The court instructs the jury that if you believe from a preponderance of the evidence in this case that the plaintiff, Edward Seybold, was injured in a collision between a truck being driven by the defendant, Peter Jacob Zimmerman, and a truck which the said plaintiff was then driving, and that at the time the said plaintiff received such injury he was in the exercise of ordinary care and caution for his own safety, and that his injury was caused by the negligence of the defendant, then you should find the issues for the said plaintiff, Edward Seybold, and assess his damages at such sum of money as you believe, from a preponderance of the evidence, will be a fair and just compensation to said plaintiff for the damages sustained by him, not exceeding the amount claimed by said plaintiff in the complaint."

1. The Court instructs the jury that if you believe from the evidence in this case that the plaintiff's automobile was injured in a collision between a truck being driven by the defendant, under such circumstances, and a truck being driven by the plaintiff, and that at the time the said plaintiff received such injury he was in the exercise of ordinary care and caution for his own safety, and that the injury was caused by the negligence of the defendant, then you should find the facts for the said plaintiff, before verdict, and award him damages as much as of value as you believe, from a representation of the evidence, will be a fair and just compensation to said plaintiff for the damages sustained by him, not exceeding the amount claimed by said plaintiff in the complaint.

2. The Court instructs the jury that if you believe from the evidence in this case that the plaintiff's automobile was injured in a collision between a truck being driven by the defendant, under such circumstances, and a truck being driven by the plaintiff, and that at the time the said plaintiff received such injury he was in the exercise of ordinary care and caution for his own safety, and that the injury was caused by the negligence of the defendant, then you should find the facts for the said plaintiff, before verdict, and award him damages as much as of value as you believe, from a representation of the evidence, will be a fair and just compensation to said plaintiff for the damages sustained by him, not exceeding the amount claimed by said plaintiff in the complaint.

Commenting on these instructions, the court said: "Both of these instructions directed a verdict upon the finding of certain facts. Neither of the instructions required the jury to find the defendant guilty of negligence as charged in the declaration. It is well established that an instruction which directs a verdict and authorizes a recovery generally without limiting the negligence to that charged in the declaration is reversible error. Herring v. Chicago & A. R. Co., 299 Ill. 214-217; Batner v. Chicago City Ry. Co., 233 Ill. 169-172; Hackett v. Chicago City Ry. Co., 235 Ill. 116-130; Molloy v. Chicago Rapid Transit Co., 335 Ill. 164-171; Garnhart v. Reeves, 288 Ill. App. 159-160; Carnahan v. Public Serv. Co., 276 Ill. App. 277-279."

The court in the ^{Herring}~~Molloy~~ case, supra, says of such an instruction: "An instruction of this character permits the jury to wander afield and return a verdict against a defendant for what they might fancy to be an act of negligence though the act so considered by them to be negligent was one which the law would not recognize as actionable."

The same error of failure to limit the negligence to that charged in the complaint occurs in plaintiff's instructions No. 9 and No. 22. But the plaintiff contends that similar error occurred in the giving of defendant's instruction No. 30 and the one appearing on page 89 of the abstract. Both of these instructions fail to limit the negligence to that charged in the complaint and the plaintiff argues that a party cannot complain of an erroneous instruction where his own instruction is subject to the same criticism. Spring Creek Drainage District v. Greenawalt, 335 Ill. 147; People v. Rudnicki, 394 Ill. 351; Hockersmith v. Cox, 407 Ill. 321; Allied Cat Company v. Hopkins, 325 Ill. App. 265; Parkin v. Rigdon, 1 Ill. App. 2d

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586. It would seem from a reading of the instructions objected to, both for the plaintiff and the defendant, that both parties are guilty of the same error, that is, failure to limit the plaintiff's right to recover to the negligence alleged in the complaint. We do not believe that the defendant can in this case complain of the giving of instructions without limitation when the defendant has given two such instructions committing the same error. It is axiomatic that two wrongs do not make a right, but in a case such as the instant case, two errors balance each other to the point that neither party may take advantage of the error of the other. All of the instructions relate to the same matter, namely the alleged negligence of defendant. Each of them fails to limit the negligence to that charged in the complaint. While the No. 6 instruction of the plaintiff is clearly reversible error and plaintiff's instructions No. 9 and No. 22 have some of the same taint, yet the instructions of the defendant being subject to the same criticism, the law will not permit either to take advantage of the error.

The matter of instructions to the jury becomes more complicated all the time. The jury of course, cannot have the pleadings. Even if the jury were permitted to take the pleadings with them into the jury room, it is doubtful if it would aid them in reaching a verdict. Formerly this was permissible, but under the law as now interpreted, the jury may not take the pleadings into the jury room. A very interesting discussion of this matter was made in the case of Signa v. Alluri, 351 Ill. App. 11. That late case also reiterates the rule in Illinois, that recovery can be had only on the negligence charged in the complaint. But the court goes on to

206. It would seem from a reading of the instructions applied to
cases for the defendant and the evidence, that such cases are
chiefly of two kinds, that is, failure to find the defendant's
guilt to recover to the satisfaction of the jury, or to
not believe that the defendant can in any way explain of the
giving of instructions without instruction when the defendant has
given two such instructions without any error. In the
automatic cases two errors are not made a trial, but in a case such
as the instant case, two errors are made when the jury finds that
neither party was guilty of the error of the other. All of
the instructions relate to the same matter, namely the alleged
guilt of defendant. Each of them fails to leave the defendant as
that charged in the complaint. While the defendant's instruction
No. 9 and 10, is clearly reversible error and defendant's instruction
No. 9 and 10, is not reversible error, but the instructions
of the defendant being guilty of the same error, the law will
not permit either to take advantage of the error.

The matter of instructions to the jury is not a mere
technicality. The jury of course, cannot have the evidence
presented to them in such a way as to make them believe that
they are guilty, it is essential that they be made to believe
that they are not guilty. Therefore this was reversible, and under the law as
now interpreted, the jury may not take the evidence into the jury
room. A very interesting discussion of this subject was made in the
case of Wainwright v. Miller, 121 Ill. 401. In that case the
court held that the rule is inflexible, that recovery can be had only on
the defendant's trial in the complaint. For the court says on p.

say: "So, too, it has been held error to instruct the jury with reference to negligence 'alleged in the complaint' in the absence of other or further instruction pointing out the negligence charged. Laughlin v. Hopkinson, 292 Ill. 80; Krieger v. Aurora, E. & C. R. Co., 242 Ill. 544; Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154; Bernier v. Illinois Cent. R. Co., 296 Ill. 464; Lerette v. Director General, 306 Ill. 348. These cases clearly disapprove of the practice of referring to the complaint in an instruction, in the absence of clarification as to what factual matters are charged in the complaint, notwithstanding statements to the contrary in a few earlier cases."

The court in the Signa v. Alluri case then goes on to the conclusion that the safe and proper rule is for the court to inform the jury in a clear and concise manner of the issues raised by the pleadings. This should be accomplished by a summary of the pleadings, succinctly stated without repetition and without undue emphasis.

A reading of the instructions submitted in this case convinces the court that on the whole the jury were properly instructed as to the issues before it, and with the exception of the instructions both for the plaintiff and the defendant that failed to limit the negligence to that charged in the complaint, there is little that appears that might have misled the jury. Our courts and judicial processes have for many years been striving for greater simplicity, without sacrifice of the rights of any litigant, but in the field of instructions to the jury, there is a long way to go.

The final contention of the defendant is to the degree of care owed to the plaintiff by the defendant club. It would seem to this

court that this is not very much in dispute.

It must be conceded that the plaintiff was an invitee upon the premises of the defendant. As a member in good standing, he was not only an invitee to the room in which he fell, but to all rooms owned and operated by the club for the benefit and use of its members. He was an invitee as a member and as a prospective customer for soup, cigars and other small sundries, and as such invitee the Elks Club owed him a duty to exercise ordinary care for his safety while on said premises. He was not a licensee in that he was there on invitation, but he was an invitee in the sense as defined in Pauckner v. Wakem, 231 Ill. 270, at page 279, where the court defines an invitee as a visitor there for a purpose connected with the business in which the occupant is engaged or which he permits to be carried on. One who enters premises by permission is a licensee and that permission limits the amount of license granted, but an invitee is one who comes upon the premises of the other to transact business in which the parties are mutually interested and as such invitee, the operator or owner of the premises owes him a duty to exercise reasonable care for his safety while he is on said premises.

The judgment of the trial court should be and is affirmed.

Judgment affirmed.

could not be held as not very much in evidence.

It was to be concluded that the plaintiff was an invitee upon the premises of the defendant. As a matter of fact, standing, as was not only an invitee to the room in which he fell, but to the room owned and occupied by the club for the general use of its members. He was an invitee as a person and as a prospective customer for food, cigars and other small necessities, and as such invitee the defendant owed him a duty to exercise ordinary care for his safety while on said premises. He was not a licensee in that he was there on invitation, but he was an invitee in the sense as defined in Langbein v. Langbein, 211 Ill. 250, 251, 252, 253, 254.

The court defined an invitee as a visitor upon the premises for a purpose connected with the business in which the defendant is engaged or which he expects to be carried on. The two classes of invitees by invitation is a licensee and a trespasser invitee and a licensee of the premises, but an invitee is one who comes upon the premises of the owner to transact business in which the parties are mutually interested and as such invitee, the defendant on owner of the premises owes him a duty to exercise reasonable care for his safety while he is on said premises.

The judgment of the trial court should be and is affirmed.

Respectfully submitted,



46417

PEOPLE OF THE STATE OF
ILLINOIS,

Appellee,

v.

TRIEM STEEL & PROCESSING,
INC.,

Appellant.

5 I.A.^{2d} 371
APPEAL FROM COUNTY

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION
OF THE COURT.

A criminal information was filed against Triem Steel & Processing, Inc., which charged the defendant with permitting a portion of the premises at the southwest corner of State Street and 26th Street, Bloom Township, Cook County, Illinois, to be used as a dumping ground in violation of section 12 of the Cook County zoning ordinance. The court found the defendant guilty and assessed a fine of \$100.00, from which the defendant has appealed.

The defendant contends that the State has failed to establish that the defendant owns, leases or otherwise controls the premises, and contends that the property in question has been subject to a nonconforming use which existed prior to the adoption of the ordinance, and which under the terms of the ordinance may be continued.

The State's theory is that the evidence does not justify a finding of a nonconforming use because that use has been expanded, and also that on the trial it was stipulated the property involved was owned and operated by the defendant.

The Cook County zoning ordinance under which the action is brought was adopted August 20, 1940. Pertinent

provisions are as follows:

"Section 12. I-2 Districts (Industry-Heavy) In the I-2 Districts the only uses which may hereafter be established are those permitted in the I-1 Districts * * * but expressly prohibiting * * * those uses which highly pollute the air with ill-smelling or noxious wastes, including among others, glue factories, tanneries, oil refineries, garbage dumps and combustible refuse dumps."

"Section 16. Nonconforming Uses and Buildings. Any use, building or structure lawfully existing or under construction on the adoption date of this ordinance or of a later amendment thereto, which does not conform to the provisions of said ordinance or amendment, shall be known as nonconforming. Such nonconforming use, building or structure may be continued, maintained, or changed to a conforming use; but a nonconforming use shall not be (a) changed to a use of a lower class, nor (b) expanded, nor (c) re-established if discontinued or changed to a conforming use for one year or more, nor (d) continued if the building or structure be destroyed or damaged to the extent of 50 per cent or more of its value. Exceptions: A nonconforming B-1 or B-2 use surrounded on two or more sides by land classified in the F or lower districts may be permitted to expand once not over 50 per cent in area and may be re-established if destroyed or damaged to any extent. * * *"

"Section 23. Enforcement and Penalties. This ordinance shall be administered and enforced by the Superintendent of Highways of Cook County, who is hereby designated the enforcing officer. Proper authorities of the county or any person affected may institute any appropriate action or proceedings against a violator as provided by statute. Any person, firm or corporation, or agents, employees or contractors of such, who violate, disobey, omit, neglect, or refuse to comply with or who resist enforcement of any of the provisions of this ordinance, shall be subject to a fine of not more than two hundred dollars (\$200) or imprisonment for not more than 6 months, or both, for each offense, and each day a violation continues to exist shall constitute a separate offense."

The evidence discloses that the premises in question, an abandoned clay hole located 600 to 700 feet south of the corner of 26th Street and State Street, Bloom Township, Cook County, Illinois, is presently being used for dumping of large quantities of rubbish, garbage and various kinds of industrial wastes. Such premises are located in territory zoned under an I-2 classification by the Cook County zoning ordinance.

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"Section 12. I-3 Districts (Imperial-Heavy) in the I-3 District the only uses which may hereafter be established are those permitted in the I-1 Districts: * * * those uses which directly pollute the air with off-gassing or noxious wastes, including smelter others, glass factories, tanneries, etc. * * * * * refuse dumps and combustible refuse incinerators."

11. Section 15. Nonconforming Uses and Buildings. Any use, building or structure lawfully existing on or before the effective date of this ordinance or of any subsequent ordinance, which does not conform to the provisions of said ordinance or ordinance, shall be known as nonconforming. Such nonconforming use, building or structure may be continued, maintained, or changed to a different use; but a nonconforming use shall not be (a) extended to a use of a lower class, nor (b) expanded, nor (c) re-established if discontinued or changed to a conforming use for one year or more, nor (d) continued in the building or structure as existing at the end of 1970 or thereafter as existing at its original location: A nonconforming B-1 or B-2 use approved on two or more sites in 1964 shall not be B-1 or B-2 use approved on two or more sites in 1964. If the B-1 or B-2 use approved may be permitted to expand and not over 50 per cent in area and may be re-established if discontinued or changed to any extent. * * *

"Section 83.3, Intimidation and Harassment. This ordinance shall be administered and enforced by the department of highways of Cook County, who in turn shall instruct the enforcement officials. Proper authorities of the county or any person affected and include any appropriate action or proceedings against a violator as mandated by statute. Any person, firm or other kind, or agent, employee or contractors of same, who violate, disobey, omit, neglect, or refuse to comply with or who resist enforcement of any of the provisions of this ordinance, shall be subject to a fine of not more than five hundred dollars (\$500) or imprisonment for not more than six months, or both, for each offense, and each day a violator is found to exist shall constitute a separate offense."

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1-2 classification by the Cook County zoning ordinance. Such premises are located in territory zoned under a quantity of rubbish, garbage and various kinds of industrial County, Illinois, is presently being used for dumping of large corner of both State and State Street, Bloom Township, Cook an abandoned city lot located 600 to 700 feet south of the

It appears from the record that the State introduced evidence tending to show that no garbage was dumped on the premises in question before 1940. The defendant introduced evidence to show that the dumping of garbage commenced as early as 1934 and has been carried on continuously since that date in greatly increased quantities. The court at the conclusion of all the evidence stated that he had arrived at the conclusion that the premises were used continuously as a dumping ground from 1940; that there has been an expansion of the use of the ground; that whereas before 1940 there was a small garbage dump, it is now a big garbage dump. The defendant was found guilty and fined \$100 and costs. The finding of the court as to the expansion of the use at the premises was justified by the evidence.

The defendant contends that the word "expand" as used in the zoning ordinance means an expansion of use beyond the original purpose or an expansion of the type of use, and that it does not mean an increase in the intensity of the same use. The case which is controlling on that question is Mercer Lumber Company v. Village of Glencoe, 390 Ill. 138, in which the court says:

"Moreover, it seems clear to us that the power to regulate a non-conforming use includes the power to limit the extension of it. While illustrations appear in our decision of ordinances containing such a restriction, (City of Aurora v. Burns, 319 Ill. 84; Klumpp v. Rhoads, 362 Ill. 412,) yet we have not directly passed upon that question. The power seems to be clearly given by the statute, and we have repeatedly upheld the validity of the statute as a whole.

"In other jurisdictions the question has been passed upon adversely to the contentions of appellant * * * [Citing cases.] A zoning ordinance is for the purpose of creating

permanent conditions throughout the city or village, and is designed to take care of the problems of the present as well as those of the future, to the extent that they can be reasonably anticipated. The provision that appellant cannot increase the cubic capacity of its structures in excess of thirty per cent, under the authority granted by the statute, is reasonable, and in fact the language of the statute justifies restrictions against any extension of the nonconforming use."

The defendant cites People ex rel. Delgado v. Morris, 334 Ill. App. 557, in support of its contention, in which case the court, after discussing Mercer Lumber Company v. Village of Glencoe, supra, holds that while in the case before it the city had authority to limit the use, such limitations had not been imposed. The other cases cited by the defendant are not applicable to this controversy. The ordinance in the case before us did provide^{that} the use should not be expanded.

The defendant strongly urges that the State failed to prove ownership or control of the premises in question. The following proceedings took place when the case was first called for trial. The state's attorney stated:

"If the court please, this in sum and substance is a question of whether or not the defendant is violating Section 12 of the ordinance. I would like to call your attention to that Section. It is on Page 3. Section 12, if the court please, establishes what is commonly known as an I-2 District, and in that I-2 District, it specifically sets forth what uses may or may not be established or carried on in that District. I should particularly like to call the court's attention to that part of the Ordinance there after Section 7: '(7) other heavy industrial uses and manufacturing, but expressly prohibiting junk yards and auto dismantling yards in the open and those uses which highly pollute the air with ill-smelling or noxious wastes, including among others, glue factories, tanneries, oil refineries, garbage dumps and combustible refuse dumps.'

"It is our contention, if the court please, that the defendant is using part of his property for a garbage dump, and I don't think that counsel will controvert that fact. The mere fact that he is using it as a garbage dump, in my

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See footnote 1, p. 100, for the source of the data.

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124-4986) submitted and in 1964 and 1965. The 1965 submission was intended to be a "final" one, but in 1966

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THE CHINESE JOURNAL OF LINGUISTICS, 1981, 14(1), 1-10

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opinion, in direct contravention of an express provision of the Ordinance makes him, in the eyes of the law, guilty. Of course, the defendant has another theory. I think you should hear from him."

The attorney for the defendant then stated:

"There are a few things that can be admitted here. In the first place, we admit we are not in an I-2 District. We are in an I-3 District. We admit that there is dumping of combustible materials and garbage on these premises - by the way, these premises are an abandoned clay hole. The property belonged originally to the National Brick Company, and after they got through making clay out there, there was a deep hole there, and dumping was going into this deep hole. However, that Zoning Code went into effect on August 20, 1940, and under Section 16 of the Ordinance here, non-conforming uses are exempted from its provisions.

"It is our contention that this dumping has been going on for a period commencing long before the Zoning Code went into effect, and that we have a non-conforming use here, so that the Ordinance does not apply." (Italics ours.)

The case was tried on November 6, 1953. After the State and defendant had rested, a discussion between the court and the state's attorney ensued. Counsel for defendant was present. The state's attorney, in response to an inquiry of the court respecting the complaint, stated:

"The complaint necessarily is a general information, if the Court please, which sets forth that the defendant did then and there on such and such a date carry on a business of dumping garbage on the premises hereinabove described in violation of * * * Section 12. * * * Counsel for the defendant brought up the fact of Section 16, wherein he attempts to establish a legal non conformity and use with respect to the dumping of garbage. * * * I say they are operating a garbage dump in violation of Section 12 * * *."

At that time nothing was said by the defendant's counsel with respect to the failure of the State to prove ownership or control. Ordinarily an attorney of record has the authority during the progress of the trial to enter into agreements with his opponent. Admissions of fact made by an attorney

option, in the event of an appeal, the defendant makes this, in the eyes of the law, null and void. Of course, the defendant has another theory. I think you should hear from him."

The attorney for the defendant then stated:

"There are a few things that can be stated here. In the first place, we admit we are not in an I-2 District, we are in an I-3 District. We admit that there is dumping of household waste and garbage on these premises. The way, these premises are an abandoned clay hole. The property belonged originally to the National Brick Company, and after they got their clay out there, there was a deep hole there, and dumping was not into this hole. However, that being hole went into other on Avenue 30, 19th, and under Section 12 of the Ordinance here, now containing uses are exempted from the provisions."

"It is our contention that this dumping has been going on for a period commencing from before the zoning laws went into effect, and that it is a continuing nuisance, so that the ordinance does not apply." (Exhibit shown.)

The case was tried on November 6, 1933. After the

State and defendant had rested, a discussion between the court and the state's attorney ensued. Counsel for defendant was present. The state's attorney, in response to an inquiry of the court regarding the complaint, stated:

"The complaint necessarily is a general information, it is the Court please, which sets forth that the defendant has been carrying on a business of dumping refuse on the premises hereabouts described in Section 12, * * * Section 12, * * * Council for the defendant is not in the lack of Section 12, wherein he attempts to establish a legal non continuing use with regard to the dumping of refuse. * * * I say they are operating a garbage dump in violation of Section 12."

At that time nothing was said by the defendant's counsel with respect to the failure of the State to move expediently on the trial. Ordinarily in an order of record has the authority stating the grounds of the trial to enter into agreement with his opponent. Admissions of fact made by an attorney

during the progress of the trial, when made for the express purpose of dispensing with formal proof of such facts at the trial, are usually held to be binding in criminal as well as in civil matters. 5 Am. Jur., Attorneys at law, §§91, 93; People v. Miller, 278 Ill. 490, 507; Allen v. U. S. Fidelity Co., 269 Ill. 234; Godwin v. State, (Del.) 74 Atl. 1101. The admissions made by the attorney for the defendant at the commencement of the trial could give rise to no inference other than he was admitting the ownership, or even more certainly, admitting the control of the premises in question. Neither when the State rested nor at the conclusion of the case was this point presented to the court or urged by the defendant's attorney. Apparently at that time it was understood by the state's attorney, the attorney for the defendant, and the court that such fact was admitted. The raising of the point in this court seems to have been an afterthought on the part of counsel. From the record it is evident that the defendant's attorney admitted that the defendant had control of the premises in question. One of the witnesses on behalf of the defendant stated during cross-examination by the State that "Mr. Triem owns that property." There was no further discussion as to Mr. Triem's relation with the suit. This evidence in the face of the admission is not material.

The court also at the conclusion of the case stated, apparently as his finding of facts, that the premises had been used as a dumping ground since 1940 to the present time without abandonment, that there had been an expansion of such

During the progress of the trial, when made for the express purpose of explaining with formal proof of such facts as the trial, and usually held to be binding in criminal as well as in civil matters. 5 Am. Jur., Attorneys at Law, § 591, 187.

Reynolds v. United States, 98 U.S. 145, 1877; United States v. Reynolds, 98 U.S. 145, 1877; United States v. Reynolds, 98 U.S. 145, 1877. The

admission made in the answer for the defendant at the commencement of the trial could give rise to no inference other than the one respecting the veracity, or even more certainly, about the fact of the premises in question.

Admission of the facts stated for the defendant of the case was this court, repeated to the court or jury for the defendant's attorney. Apparently it was not intended by the state's attorney, the court for the defendant, and

the court the court to be admitted. The relation of the point to this court seems to have been established on the part of counsel. From the record it is evident that the

defendant's attorney is admitted upon the fact that he is admitted of the premises in question. One of the witnesses on behalf of the defendant stated during the examination by the State

that "Mr. [Name] owns that property." There was no further discussion as to Mr. [Name]'s relation with the suit. This evidence in the face of the admission is not relevant.

The court in its opinion of the case stated, apparently as the finding of fact, that the premises had been used as a place of business since 1880 to the present time without interruption, and that it had been an extension of such

-7-

use, and that at the time the ordinance went into effect it was a small garbage dump while now it is a big garbage dump. This finding of the court is supported by the evidence.

It is our opinion that Cook County had the power to pass the instant ordinance limiting an expanded use. The judgment of the trial court is affirmed.

Judgment affirmed.

Robson and Schwartz, JJ., concur.

used, and that at the time the ordinance was introduced it was a small garbage dump while now it is a big garbage dump. This finding of the court is supported by the evidence. It is our opinion that Cook County had the power to pass the ordinance limiting an expended use. The judgment of the trial court is affirmed. Judgment affirmed.

Justice and Johnson, JJ., concur.

46489

THE PEOPLE OF THE STATE OF
ILLINOIS, Defendant in Error,

v.

SOL NITTI, Plaintiff in Error.

122 A
1 5 I.A.^{2d} 3.1
ERROR TO CRIMINAL COURT,
COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

Defendant was indicted, tried and convicted in the Criminal Court of Cook County for the crime of receiving stolen property. The indictment was in two counts. The first charged the defendant, Nitti, together with Robert Swaider and Jack Miller with stealing two cases of cigarettes, each case containing 100 cartons and valued at \$100, two accordions, twenty-four radios and two vacuum cleaners, the property of Kramer Bros. Freight Lines, Inc. The second charged the same parties with receiving two cases of stolen cigarettes, etc., the property of Kramer Bros. Freight Lines, Inc., knowingly, etc. Defendant moved for a severance and the charges were tried separately. He pleaded not guilty and waived a jury. Upon the trial Swaider and Miller confessed theft of the property and testified that they sold 43 cartons of the cigarettes to defendant Nitti. The court found the defendant guilty of receiving 43 cartons of stolen cigarettes of the value of \$43, knowingly, etc., and overruled his motions for new trial and in arrest of judgment. The court ordered restitution and granted probation as to Swaider and Miller.

Defendant assigns three errors as grounds for reversal. They are (a) value of the 43 cartons of cigarettes was not proved by competent evidence; (b) ownership of the goods in Kramer Bros. Freight Lines, Inc., was not proved; (c) the State did not prove the defendant guilty of the crime of receiving stolen property beyond a reasonable doubt.

As to the value of the cigarettes, Kramer Bros., Chicago terminal manager, Berg, testified to their value from a waybill. It was not introduced in evidence. Defendant objected. Berg then testified to their value of his personal knowledge and belief. He testified that each carton had a value of \$2.75. Defendant contends that Berg was not qualified as an expert, that no proper foundation was laid for opinion evidence and that Berg was reading from the waybill. Defendant made no attempt to introduce contrary evidence. The court found the value to be \$1 a carton. It is common knowledge that 43 cartons of cigarettes have some market value. (See Cheatwood v. State, 22 Ala. App. 165, 113 So. 482, certiorari denied 216 Ala. 692, 113 So. 915; People v. Simmons, 28 Cal. 2d 699, 172 P. 2d 18; 22 C. J. S. Criminal Law sec. 565, p. 880.) The court, apparently of its own knowledge, found the cigarettes had an ascertainable minimum market value at the time and place where they were stolen. The court was not misled by Berg's testimony. Defendant did not offer to contradict the court's finding and we are of the opinion

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that it satisfied the rule requiring proof of value beyond a reasonable doubt in criminal cases. (People v. Palmer, 351 Ill. 319, 325; People v. Herring, 396 Ill. 364, 370.) The case of Thompson v. People, 125 Ill. 256, cited by defendant, and the cases there cited, involved convictions for the felony offense of receiving stolen property and sentences there were to the penitentiary. The goods involved in those cases were of a less certain market value. In such situations it becomes important to establish beyond a reasonable doubt that the value of the stolen goods was in excess of \$50 in order to justify conviction for a felony and not a misdemeanor. Ill. Rev. Stat. 1953, ch. 38, sec. 492. The verdicts returned by the juries in the cited cases contained no specific finding of value, but merely found the defendant guilty as charged in the indictment. That situation is not before us.

As to the ownership of the goods, Berg testified that on November 15, 1953, at about 10:00 p.m., trailer trucks belonging to his company were parked in its lot, their doors shut and sealed. At 7:00 a.m. the following morning the seal on the doors of one of its trucks was discovered broken and the doors open. Inventory by Berg of the merchandise in the truck against the freight manifest disclosed two cases of cigarettes, radios, accordions, etc., missing. Some of this property was recovered and later identified by Berg at the Lawndale Police Station. Swaider and Miller testified that on November 15, 1953, at about

10:00 p.m., they broke into and removed from a Kramer Bros.' trailer truck in the terminal station two cases of cigarettes, radios, accordions, etc. Berg testified that his company had not owned the merchandise; however, his company owned the "certificate to the property." Defendant objected to this testimony because the certificate was not introduced in evidence. Defendant did not introduce contrary evidence. Destination of the trailer truck of Kramer Bros., a common carrier, was Chicago and the merchandise in it was consigned to Kramer Bros.' Chicago Terminal. Berg testified that the merchandise stolen and unrecovered had not been insured and that the loss to his company was \$830. A common carrier as bailee of goods has a special ownership in such property. This ownership is enough to maintain an action against third persons for the recovery of the goods or their value. Chicago, R. I. & P. R. Co. v. North American C. S. Co., 244 Ill. App. 522. As a common carrier, it was absolutely liable, with certain exceptions not relevant or material here, to account to the owner for the goods entrusted to it. Meyer v. Rozran, 333 Ill. App. 301. Defendant did not object to Berg's testimony as to his company's loss. Nor did defendant offer contrary evidence. We are of the opinion this was sufficient to establish ownership of the property in Kramer Bros. (Cf. People v. Jurek, 357 Ill. 626, 632-3.)

Defendant cites People v. DePaape, 281 Ill. 318, People v. Smith, 341 Ill. 649, and People v. Thomas, 393 Ill. 573, in support of his contention that Kramer Bros.'

ownership was not proved beyond a reasonable doubt. They are distinguishable. In People v. DePaepe, supra, the alleged owner, the prosecuting witness, produced only an invoice from a shipper billing him for the purchase of certain goods and stating that the "balance will follow" to prove that the goods invoiced were the same goods stolen from a railroad car. The court held that this inadequately proved delivery by the shipper of the invoiced goods to the carrier, identity of the goods stolen as those of the prosecutor's shipper, or that he ordered the invoiced goods or that the goods stolen were of the same make as those invoiced. The invoice, under the circumstances, lacked probative value and was properly held incompetent to make proof of the witness's ownership. In People v. Smith, supra, the indictment charged the property was in Chester Olenec. The record showed the property in Nellie Olenec and her husband. There was no showing that her husband's name was Chester. In People v. Thomas, supra, the indictment was in three counts. One count alleged the property was in the Alton Railroad Company. The evidence failed to disclose receipt of the stolen property at the freight house. The evidence also showed that the freight house was used jointly by the Alton Railroad and the Baltimore & Ohio Railroad companies. The object in identifying the person injured in a criminal prosecution is to foreclose the possibility that the accused may be again tried for the same offense. People v. Smith, supra, at p. 652. We find no such possibility in the instant case.

As to the last point that the State did not prove beyond a reasonable doubt that defendant was guilty of receiving stolen property, the only testimony or evidence that defendant received the stolen property knowing that it had been stolen came from Swaider and Miller. Both were on probation for previous felonies involving thefts from trucks. Both again were given probation for the charges in the indictment under which defendant Nitti was convicted. The cigarettes were not found in defendant's possession. Defendant asserts that it is a well-established rule of law that while a conviction may be had upon the uncorroborated testimony of a confessed accomplice, yet such evidence is of doubtful integrity, and should be received with great caution. This is the law. People v. Feinberg, 237 Ill. 348; People v. Baskin, 254 Ill. 509; People v. Moeller, 260 Ill. 375.

The trial judge saw and heard the witnesses, and while the testimony of Swaider and Miller must be closely scrutinized, because it is upon this testimony, if at all, the judgment of conviction must be sustained, we are not prepared to say that there was error in giving credence to that testimony. (People v. Jurek, 357 Ill. 626.)

Swaider and Miller both testified that they sold 43 cartons of cigarettes to defendant Nitti for \$40. Both testified that Nitti inquired and was told the cigarettes were "hot" or stolen. The circumstance itself, if true, that Nitti paid only \$40 for 43 cartons was some evidence of his guilty knowledge. Swaider testified that he had

As to the last point, that the State did not prove

beyond a reasonable doubt that defendant was guilty of

receiving stolen property, the only testimony or evidence

that defendant received the stolen property was that

it had been stolen from the State and Miller, John

was a recipient for stolen property, and that

the State was given evidence for the charges

which were made against him, and was convicted.

The State was not given evidence for the charges

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The State was not given evidence for the charges

known Nitti before. Both Swaider and Miller described the back room of Nitti's tailor shop where they testified the sale took place. There are some inconsistencies in their testimony but both agreed on the basic facts. (People v. Jurek, supra, at 631; People v. Baskin, supra, at 512.)

It was stipulated between the parties that Nitti had been convicted in 1933 of armed robbery and sentenced one year to life. He testified that for four years he had been operating a cleaning and dyeing business. He admitted he knew Swaider. In 1952 Nitti served 90 days in the County jail. There he met Swaider. Nitti admitted that Swaider and Miller had been in his place of business at least three times during 1953. The first time they had attempted to sell him radios, the second time, a couple of weeks later, accordions. He did not testify to the approximate dates these incidents occurred. Nor did he give any approximate date for the third visit or state the reason they had come to see him. He denied that they had ever offered to sell him cigarettes or that he bought any from them at any time. On cross-examination he testified that on the first occasion he "got afraid" as soon as they came in. When they asked him to buy an accordion or accordions he said, "No, leave!" They left. Previously in his direct testimony he had stated that on the first occasion it was radios that they had offered to sell him. Later on cross-examination his testimony indicates that they wanted to sell him radios on the second occasion. Previously the assistant State's attorney asked him whether he,

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(The following information was obtained from the records of the Federal Bureau of Investigation.)

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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THE UNIVERSITY OF CHICAGO

Journal of Management Studies, 19(1), 67-80.

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Nitti, had been on the premises when they came to sell him accordions. Nitti replied, "No." On cross-examination he testified that he asked them to leave his premises immediately. He could not explain the bizarre fact that Swaider and Miller should return so often after having been so emphatically and clearly told by Nitti to leave because he was legitimately conducting an honest business. (Cf. People v. Jurek, supra, at 630.) Nor did Nitti ever report these incidents to the police. He testified that they had never walked to the back of the store and he had not taken them there. In fact, if we accept his testimony literally, he dismissed them almost as soon as they had opened the door or stepped inside the store. He denied that they had described his back room accurately. But he offered no evidence to contradict their descriptions.

The weight to be given the evidence was a matter peculiarly within the province of the trial court. People v. Jurek, supra, at 632; People v. Sciales, 353 Ill. 169; People v. Baskin, supra, at 512. Its judgment will not be disturbed unless it is plainly apparent that the defendant was not proved guilty of the charge in the indictment beyond a reasonable doubt. People v. Jurek, supra, at 632. We cannot say the court erred in believing Swaider and Miller and in not believing Nitti.

Judgment affirmed.

McCormick, P. J., and Schwartz, J., concur.

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46568

126 A
5 I.A. 372

See attached page

LINCOLN VILLAGE SHOPPING CENTER,
INC., and ERNEST G. SHINNER,

APPEAL FROM

Appellees,

CIRCUIT COURT

v.

HOWARD T. FISHER and ASSOCIATES,
INC.,

COOK COUNTY.

Appellant.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding to set aside for fraud a decree awarding a mechanic's lien for \$35,375 to defendant, Fisher Co. The decree was vacated and plaintiffs Shinner and Lincoln Village Shopping Center have appealed.

The mechanic's lien decree was entered May 20, 1953 for architectural services. The instant proceeding was begun September 17, 1953 and the following day the Chancellor ordered a restraint on enforcement of the mechanic's lien decree. October 5th, Fisher Co. moved for change of venue. The motion was denied October 19th and Fisher Co. moved to strike the complaint and to dismiss the proceeding.

The motion to dismiss was on the ground that Shinner and Lincoln Village Shopping Center were not properly parties plaintiff, since (a) Shinner's answer in the mechanic's lien suit denied having interest in the real estate, subject of the lien, and alleged that Lincoln Village Shopping Center was sole owner and (b) Lincoln Village Shopping Center had conveyed its interest February 6, 1952, several months before this suit was begun. The motion to strike charged lack of diligence, unclean hands, no showing of fraud and impossibility of meritorious defense by Shinner and Lincoln Village Shopping Center because of lack of interest in the real estate.

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| LINCOLN VILLAGE SHOPPING CENTER,
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| Appellees, |) | CIRCUIT COURT |
| |) | |
| v. |) | |
| |) | |
| HOWARD T. FISHER and ASSOCIATES,
INC., |) | COOK COUNTY. |
| |) | |
| Appellant. |) | |

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

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The motion to dismiss was on the ground that Shinner and Lincoln Village Shopping Center were not properly parties plaintiff, since (a) Shinner's answer in the mechanic's lien suit denied having interest in the real estate, subject of the lien, and alleged that Lincoln Village Shopping Center was sole owner and (b) Lincoln Village Shopping Center had conveyed its interest February 6, 1952, several months before this suit was begun. The motion to strike charged lack of diligence, unclean hands, no showing of fraud and impossibility of meritorious defense by Shinner and Lincoln Village Shopping Center because of lack of interest in the real estate.

The motions admit the facts well pleaded: After the mechanic's lien suit was filed Shinner and Lincoln Village Shopping Center had for many months accommodated Fisher Co. attorneys with continuances of hearings for discovery for purposes of answering. March 13, 1953 the cause appeared on a progress calendar" and an attorney for Shinner and Lincoln Village Shopping Center appeared in court, told the clerk the cause was not at issue and was informed not to await the call because the cause would "go over" to fall. March 19th the docket was checked and showed no order of March 13th. On September 9th, 1953, the docket was checked again and disclosed a default decree in favor of Fisher Co. entered May 20th. The Clerk of the Court was authorized to inform attorney for Shinner and Lincoln Village Shopping Center as he did. He neglected to note that the cause was to "go over", erroneously placed it on call for May 19th and prepared no order for entry to that effect.

On May 19th the Fisher Co. attorney told the Chancellor the cause was not being contested and relying upon the representation the Chancellor permitted the "prove up" and the following day without notice to Shinner and Lincoln Village Shopping Center and relying on the repeated representation entered the mechanic's lien decree. The Chancellor would not have done this had it not been for the representation which was false and deliberately made, and induced the Chancellor's action. These are the admitted facts.

Fisher Co. contends the Chancellor erred in denying the motion for change of venue and that the decree vacating the mechanic's lien decree is therefore void. Were we to sustain this contention the cause would be remanded with directions to the Chancellor to allow the motion and presumably the cause would proceed before another Chancellor. The Chancellor who made the ruling is no longer a Judge of the court to which the cause would be remanded and consequently we think no good purpose would be served in passing on this contention, in view of the fact that the decree must be reversed for another reason.

In the decree vacating the mechanic's lien decree, the Chancellor found that the essential question of fact was whether the representation, of no contest, was made, was false, relied on by him and induced the decree. He decided the "issue" against Fisher Co. on the basis of "personal knowledge". He further decided that the law did not disqualify him from deciding the "issue" on personal knowledge; that this proceeding was "in effect" a continuation of the mechanic's lien suit; and justice would not be served by permitting Fisher Co. to plead. Subsequently the Chancellor denied Fisher Company's motion to vacate that decree, denied leave to answer or file counter-affidavits, and stated his opinion that the attempt to challenge the Chancellor's "personal knowledge" was "contumacious".

The answer and affidavits which Fisher Co. attempted to file denied that the representations were made as found

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10. The tenth question is whether the evidence is sufficient to establish that the defendant was guilty of the crime charged. The evidence is sufficient if it is reasonable to conclude that the defendant committed the crime.

upon the Chancellor's "personal knowledge". These proffered pleadings present a different version of what transpired in court May 19th and May 20th, 1953. The motion to vacate presented with the answer and affidavits challenges the right of the Chancellor to enter a decree in January, 1954 based on his "personal knowledge" of what occurred eight months previously.

No purpose will be served by deciding whether we should treat this proceeding as a Bill in the Nature of a Bill of Review or a motion in the nature of coram nobis under Sec. 72 of the Civil Practice Act. That motion is available in Illinois when fraud has the effect of "preventing the litigant from making his defense," and may be addressed to the equitable powers of the court when "necessary to prevent injustice." Ellman v. De Ruiter, 412 Ill. 285, 291-2.

We cannot agree that the Chancellor had the right to found the decree on his own "personal knowledge" and on that basis to vacate the decree "summarily." None of the direct contempt cases cited by Shinner and Lincoln Village Shopping Center is authority for the Chancellor's decree on "personal knowledge." Typical of these cases is People v. Hagopian, 408 Ill. 618. There evidence of contempt was taken and the following day the respondent refused to answer and refused "to make a statement or offer any evidence." That case and others cited state the rule that in direct contempt the judge may act upon personal knowledge without a hearing. But this rule presupposes that the judge "acts upon view."

People v. McDonald, 314 Ill. 548, 551. Here the Chancellor acted eight months later.

We think Fisher Co. was entitled to make issue upon the allegation, among others, that the representations, of no contest, were made, were false and induced the decree. The issues may be treated as under a motion under Sec. 72 and that a different judge may hear them is of no consequence. In People v. Sheppard, 405 Ill. 79, the court (page 82) said the motion under Sec. 72 should be presented to the same judge who rendered the original judgment. Yet in Ellman v. De Ruiter, 412 Ill. 285, the judge who had entered the default was no longer a member of the court and the motion was "necessarily presented to and heard by another judge."

The Chancellor should have, on motion of Fisher Co., vacated the decree based upon his "personal knowledge" and allowed Fisher Co. to file appropriate pleadings forming the issues it desired to form.

The decree is reversed and the cause remanded with directions to allow Fisher Co. to file pleadings joining issues upon the complaint and for hearing of the issues.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

LEWE AND FEINBERG, JJ. CONCUR.

46583

CAMILLE DeROSE,

Appellant,

v.

GEORGE C. ADAMS, et al.,

Defendants,

AARON H. PAYNE,

Petitioner - Appellee.

127 A
15 I.A. 2d 3-3
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree allowing intervening petitioner Payne fees claimed by him for services rendered as attorney for plaintiff in various proceedings. The matter was heard on his petition, plaintiff's answer thereto and evidence taken. The decree recites that the court heard evidence and makes specific findings of fact as to the services rendered in various proceedings, as well as the amount due petitioner pursuant to a written agreement between plaintiff and petitioner retaining him as plaintiff's attorney.

The court had jurisdiction of the parties and the subject matter. There is no report of proceedings. We cannot know what evidence the court heard to justify its decree. In the absence of such a report of proceedings, and the evidence not being preserved in any other form, we must presume that the evidence heard was sufficient to justify the decree. Jaffe v. Tenenholtz, 333 Ill. App. 357; Ferro v. Daros, 343 Ill. App. 267 (Abst.); ABC Loan Co. v. Campbell, 1 Ill. App. 2d 297 (Abst.).

Accordingly, the decree appealed from must be affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

46451

MARGARET F. MANGOLD,

Appellee,

v.

R. HENRY MANGOLD,

Appellant.

128 A
1 5 I.A. 2d 3 3
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his petition praying for the modification of a divorce decree by requiring plaintiff to return the minor children of the parties to the State of Illinois and for suspension of payment for their support. No appearance or brief was filed by plaintiff in this court.

June 11, 1953 a divorce decree was entered in favor of plaintiff which awarded sole custody of the minor children aged seven and nine, respectively, to the plaintiff and directed the defendant to pay to the plaintiff the sum of forty dollars weekly for the support of the children. The decree further provided, "with the right to plaintiff to reside with said minor children out of the State of Illinois, at her discretion, and with the right to defendant to see and take out said children at all reasonable times." This provision was incorporated in the decree in accordance with a stipulation which also disposed of certain personal property and real estate owned by the parties.

December 10, 1953 defendant filed a sworn petition alleging that at the time of the entry of the divorce decree

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it was contemplated that the plaintiff reside with her mother in the City of St. Louis, Missouri; that defendant objected to plaintiff residing out of the State with said children; that the signing of the stipulation was obtained "through a ruse"; that on October 23, 1953 plaintiff permanently removed with the children to the City of Fort Lauderdale, Florida, where she is now residing; that defendant did not consent to the removal of the children to the State of Florida; that due to "expense involved," defendant cannot visit the children, and that the provision of the divorce decree permitting plaintiff and the children to reside "out of the State of Illinois, at her discretion" is void. The petition prays that the divorce decree be modified by directing the plaintiff to return the minor children to the State of Illinois and that until the children are returned to this State all payments for their support be suspended.

No answer was filed by plaintiff. The report of proceedings consists almost entirely of a colloquy between defendant, who appeared pro se, plaintiff's counsel, and the court.

On the first page of the report of proceedings before the colloquy began, appears the following in parenthesis "(whereupon proceedings and evidence was heard but not reported)". The order here appealed from recites that, "the court having jurisdiction and being fully advised by the testimony of the parties and arguments of counsel." Defendant says "no evidence as such was taken but a colloquy between counsel and the court disclosed" certain facts.

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According to the statement of plaintiff's counsel when the divorce decree was entered, plaintiff and the minor children lived with plaintiff's mother at St. Louis, Missouri. About four months later at the suggestion of her doctor plaintiff's mother went to Florida because of illness. She was accompanied by plaintiff and the minor children. Defendant admitted that plaintiff is "a good mother" to the children.

The record shows that the chancellor dismissed defendant's motion to modify the divorce decree on the ground that "there is no matter of controversy before me."

Defendant's principal contention is that since minor children in a divorce proceeding become wards of the court it is the duty of the court to keep them within its jurisdiction, citing Wade v. Wade, 345 Ill. App. 170; Seaton v. Seaton, 337 Ill. App. 651, 86 N. E. 2d 435; and Martinec v. Sherapata, 328 Ill. App. 339, 66 N. E. 2d 103.

In support of his contention defendant argues that plaintiff's failure to answer his petition admits the facts alleged therein. Ordinarily this is true but in this case the parties proceeded on the theory that an issue had been formed and they treated the statements of defendant and plaintiff's counsel as competent. In the defendant's brief in this court excerpts of the colloquy are quoted as proof of facts.

Assuming the colloquy is competent evidence, as defendant suggests, we think the chancellor could find that the plaintiff's residence in Florida is temporary while she is nursing her sick mother. The admissions made by the

defendant upon interrogation by the chancellor clearly show that the provisions of the stipulation with respect to the custody of the children which were later embodied in the decree of divorce were not obtained "through a ruse" or any form of deception.

Defendant did not take an appeal from the divorce decree. This proceeding is a collateral attack upon the decree (Barnard v. Michael, 392 Ill. 130.) Every presumption is in favor of the decree of divorce (Cullen v. Stevens, 389 Ill. 35.)

In the present case at the time the stipulation was signed defendant knew that plaintiff and the children were going to reside in another State with plaintiff's mother. None of the provisions of the stipulation or the decree of divorce indicate that "it was contemplated" that plaintiff and the children were going to reside in the City of St. Louis with plaintiff's mother, nor is there any evidence tending to prove this fact. We think the petition was addressed to the discretion of the chancellor. The transcript of the proceedings and the order denying plaintiff's petition show that there was evidence taken. On this record we must assume that the evidence was sufficient to support the chancellor's findings.

For the reasons given, the order is affirmed.

ORDER APPEALED FROM AFFIRMED.

KILEY, P.J. CONCURS.

FEINBERG, J. TOOK NO PART.

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46469

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff - Appellee,

v.

LOUIS H. GREGORY,

Defendant - Appellant,

and

CAROLINA CASUALTY INSURANCE COMPANY,
a North Carolina Corporation,

Surety - Appellant.

5 I.A.^{2d} 374
APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a scire facias proceeding. A criminal recognizance bond was executed by defendant Carolina Casualty Insurance Company, a North Carolina corporation, as surety, and Louis H. Gregory as principal. Gregory was charged with the crime of petty larceny.

When Gregory failed to appear on January 2, 1954, his bond was forfeited and a scire facias was issued by the Clerk of the Municipal Court, returnable on March 9, 1954. On that day a default judgment was entered against the Insurance Company for \$200, that being the full amount of the bond, and costs amounting to \$20. The Insurance Company appeals.

Defendant's sole contention is that the bailiff's return does not show that the service was made on any officer or agent of the surety so as to vest the court with jurisdiction.

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Defendant says that the provisions of Chapter 110, Section 141 of the Illinois Revised Statutes 1953, State Bar Edition, are jurisdictional requirements which necessitate a return that shows service on a named person who is either an officer or agent.

The return of service of the writ of scire facias by the bailiff of the Municipal Court reads:

"I have duly served the within writ upon the within named defendant Carolina Casualty Insurance Company, a corporation, on the 2nd day of March 1954 by leaving a copy thereof * * * with John Doe, Agent, who refused to give true name of said defendant found in the City of Chicago. Albert J. Horan, by J. Sharpe, Deputy."

April 2, 1954 the Insurance Company filed a petition in support of its motion to vacate the judgment. The pertinent allegations read as follows:

"That at entry of judgment, defendant had no notice or knowledge of the pendency of plaintiff's suit; that Dave White, 188 West Randolph Street was registered agent of defendant in Chicago; that scire facias in said cause was not served upon an officer or registered agent of defendant or any other agent.

"Defendant has a good and meritorious defense to said suit; that there is not any record of supposed bond mentioned in scire facias of said cause in the manner and form as plaintiff in scire facias writ has alleged."

The prayer of the petition asks that the judgment by default be vacated and that the petition stand as defendant's affidavit of defense.

April 5, 1954 the Insurance Company filed a special appearance asserting that the court did not acquire jurisdiction of the Insurance Company.

In support of its contention defendant cites Phillips v. Interstate Motor Freight System, 45 F. Supp. 1;

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Trust Company of Chicago v. Sutherland Hotel, 323 Ill. App. 73; and Illinois & Mississippi Telegraph Company v. Kennedy, 24 Ill. 319. We do not find these authorities helpful. In the Phillips case defendant made a motion to quash the return of summons. In Trust Company of Chicago, involving an action for wrongful death, the issue of fact presented was whether defendant controlled and operated a hotel where the accident occurred. And in Illinois & Mississippi Telegraph Company v. Kennedy a default judgment was reversed because of insufficient service. From a reading of the opinion in that case we cannot ascertain how the question was raised.

In the instant case the prayer of the petition to vacate the judgment does not seek to quash the bailiff's return.

Formal defense and irregularities in process or service thereof must be taken advantage of at the first opportunity and before any step in the cause is taken; otherwise they will be held to be waived. (Athens v. Ernst, 342 Ill. App. 357.) An appearance may be entered by making a motion, by filing an answer, and in other ways. (Walter v. Bowman Dairy Co., 318 Ill. App. 305.) In the present case the filing of the petition to vacate the judgment waived all questions relating to the manner of service. See The People v. United Medical Service, 362 Ill. 442. Under the authority of Athens v. Ernst, 342 Ill. App. 357, the special appearance filed three days after the petition to vacate the judgment was not filed in apt time.

The petition to vacate the judgment is signed by one Philip Kitzer. There are no allegations indicating Kitzer's relationship to the Insurance Company. Moreover, the petition does not deny that he was the "John Doe" served with the writ of scire facias. Under these circumstances, we cannot say that the service was void.

With respect to the defense alleged in the petition, the Insurance Company states "that there is not any record of the supposed bond." It does not allege, however, that the bond here in controversy was not executed by the Insurance Company. In our view the petition does not allege a good and meritorious defense.

For the reasons given, the judgment entered March 9, 1954, and the order denying a motion of the Insurance Company to vacate the judgment, are affirmed.

JUDGMENT AND ORDER AFFIRMED.

KILEY, P.J. AND FEINBERG, J., CONCUR.

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Figure 1. A schematic diagram of the proposed system.

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46540

EDNA E. BARNETT,

Plaintiff - Appellant,

v.

SALLIE C. AMBLER, et al.,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a suit to foreclose a mortgage. Plaintiff appeals from an order dismissing her complaint upon defendants' motion to strike.

October 5, 1953 plaintiff filed a complaint alleging in substance that a prior foreclosure suit was filed in the Superior Court of Cook County by plaintiff on November 26, 1943, based on the same trust deed and notes as in the present suit; that the former foreclosure suit was filed within the period provided by the statute of limitations and was pending until June 30, 1953 when it was dismissed for want of prosecution; that due to the death of her attorney in that suit plaintiff had no knowledge of its dismissal; and that the bill of complaint in the instant case was filed within one year from the time the former suit was dismissed, in accordance with the provisions of Section 24(a) Chapter 83 of the Act in regard to limitations, Illinois Revised Statutes 1953, Volume 2, State Bar Association Edition.

The complaint further alleges that on November 26, 1923 Leroy F. Washburn being indebted in the sum of \$4,500, simultaneously executed a note for that amount due five years after date and a trust deed to secure payment of the note;

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that on October 27, 1928 payment of the principal note was extended for five years from November 26, 1928; and that the principal note and certain interest coupon notes became due and are unpaid.

October 7, 1953, a receiver was appointed of the mortgaged premises. October 20, 1953 defendant Melton filed a motion to strike the complaint on the following grounds:

"(1) that the complaint in this cause states that on the 26th day of November 1923 the trust deed and notes being foreclosed in this cause were executed and the same were subsequently extended on the 26th day of November 1933 and by the terms then and there became due and were never thereafter extended;

"(2) that under and by the laws and statutes of the State of Illinois said notes were outlawed and the lien of said trust deed is not foreclosable, the said note being more than ten years past due since its due date and no extensions having been filed of record to indicate that said note was extended by any person or persons having the right to extend the same."

The order appealed from finds that the right to foreclose the trust deed and notes here in controversy is barred by the statute of Illinois and that the plaintiff was not entitled to file her suit under Section 24(a), Chapter 83, "inasmuch as she has been guilty of laches in pursuance of her remedies, failing to diligently pursue her cause of action, said cause of action having been filed on November 26, 1943, and having subsequently been twice dismissed for want of prosecution."

The pertinent part of Section 24(a), Chapter 83, reads:

" * * * If the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not thereafter."

In ruling on defendant's motion to strike we must assume the allegations of the complaint to be true. According to the complaint the payment of the note for \$4,500 which became due November 26, 1928 was extended for a period of five years. Defendant admits that the former suit was filed within the statutory period of limitation.

Plaintiff contends that under the provisions of Section 24(a) she may institute a new foreclosure action within one year after the involuntary nonsuit of the former proceeding. When the former suit was dismissed on June 30, 1953 plaintiff was barred from starting another suit since the statutory period of limitation had expired while that suit was pending. The law is well established that under these circumstances plaintiff had a right to commence a new action, as she did, under the provisions of Section 24(a) because of the involuntary nonsuit of the prior suit within one year after June 30, 1953. (Boyce v. Snow, 187 Ill. 181; Holmes v. C. & A. R. R. Co., 94 Ill. 439; Spring Valley Coal Co. v. Patting, 112 Ill. App. 4.)

Plaintiff insists that the defense of laches to be availed of must be set up by plea or answer. We agree. Here the question of laches was not raised by defendant's motion to strike, hence the plaintiff was not given an opportunity to amend her complaint by stating the reasons, if any, for the delay. (Evans v. Tabor, 350 Ill. 206.) See Dixmoor Golf Club v. Evans, 325 Ill. 612. In the absence of allegations in the pleadings showing the circumstances under which the cause was twice dismissed for want of

prosecution, we do not think an inference can be drawn of lack of diligence on the part of the plaintiff. We must assume, therefore, that the reinstatement of the cause on both occasions was justified.

For the reasons given, the order striking the complaint and dismissing the cause is reversed, and the cause is remanded for further proceedings.

ORDER DISMISSING COMPLAINT REVERSED
AND CAUSE REMANDED FOR FURTHER
PROCEEDINGS.

KILEY, P.J., CONCURS.

FEINBERG, J., TOOK NO PART.

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On April 24, 1954, Helen Ridge filed her petition in this cause by which she sought the sole custody of her child in her own home on alternate holidays and for a specific two-week period during the summer vacation and at other definite times. Her petition alleged that at the time the divorce decree was entered, petitioner maintained no home in which she could keep her minor child and that she has remarried and lives with her husband in Dixon, Illinois, in a home suitable and adequate to maintain said child; that since the divorce decree was rendered, defendant insists that petitioner should only see her child at his home, the effect of which has, as a practical matter, deprived her of her right of visitation. No answer was filed to this petition, but a hearing was had resulting in an order awarding the temporary custody of said child every third week from nine o'clock, a.m., Saturday to five o'clock the following Sunday afternoon, beginning May 15, 1954, and for a period of two weeks beginning at nine o'clock, a.m., August 1, 1954, and ending at five o'clock, p.m., August 15, 1954, and also on alternate holidays (July Fourth, Thanksgiving, and Christmas) beginning July 4, 1954, to the mother. To reverse this order, the defendant appeals.

Upon the hearing, the only evidence offered was the testimony of petitioner. She testified that at the time the decree for divorce was rendered, she was employed at nights and living in a one-room apartment; that she has since remarried and lives with her husband in a three-room apartment in Dixon; that her husband is employed as a switchman in a cement plant, and that she is working as a waitress at the Club Cafe in Dixon. She further testified that she is the mother of two other boys by a former marriage, aged twenty-one and eighteen respectively, but who do not make their home with petitioner; that her husband

On April 20, 1920, John Edgar Hoover was appointed

to the office of chief of the Bureau of Investigation of the

Department of Justice, and he has since that time been

the most efficient and energetic chief of the Bureau.

His office is located in the Department of Justice Building, Room 1000.

He is a native of the State of Ohio, and he has been

in the service of the Department of Justice for over

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is not acquainted with her son whose custody is the subject of this litigation but has no objection to her having the custody of her son at such times as she desires. Upon cross-examination, she testified that her husband had sole custody of the boy for fifteen months before the divorce decree was rendered while she and her husband were living apart; that her husband has not remarried but maintains a home for the boy at Sterling and that she has been in the habit of going there on Thursdays and that her former husband has never objected to her taking the boy outdoors upon the occasion of her visits, but the boy will not go outdoors if his father is home at the time of her visits; that when she sees her son, she visits with him in the living room of his father's home from twenty-five to forty minutes and she and her son talk about his school work, his playmates, and the Cub Scouts; that her son visits with her when his father is not there, but when the father returns, the visit is over; that she gets along all right with the boy and expressed her belief that her son should be permitted to have her love, affection, and companionship, and that this is only possible if she is permitted to have her son in her own home.

Counsel for appellant call our attention to *Nye v. Nye*, 411 Ill. 408, *Maupin v. Maupin*, 339 Ill. App. 484, and *Erickson v. Erickson*, 344 Ill. App. 550, and argues that the record shows that the minor son of the parties is a happy, normal, nine-year-old boy, attending school and engaging in Scout work and other typical activities; that the satisfaction or dissatisfaction of either of the parents with the present

[illegible]

arrangement is of secondary importance, the main consideration being the welfare of the boy. Counsel continue: "To uproot him on every third week end from Saturday morning to Sunday night during the school year and for a two-week period in the summer and forcibly transplant him into a three-room apartment in a strange city and in the home of a man whom he has never met and who is now married to his mother and away from his friends, his home, his scout work and boyhood activities is unwarranted and certainly not in his best interests."

Appellee insists that she should be permitted to visit her son under proper circumstances and that this can only be accomplished by having her son in her own home. Her counsel argues that appellee should be permitted to see her child in her own home in order to be able to secure and retain his love and affection and call to our attention *Bates v. Bates*, 166 Ill. 448, and to *Ridge v. Ridge*, 1 Ill. App. 2d 226.

The original decree in this case was rendered on April 10, 1953. Less than two months thereafter, appellee filed her petition asking that the provisions of this decree be modified so that she would have the right to take her son to her own home for certain periods of time and during the summer vacation. In affirming the order of the chancellor which modified the original decree by granting the mother custody of her son between the hours of one o'clock and six o'clock, p.m., on Sunday, July 19th, Sunday, August 2nd, and Sunday, August 16th, 1953, this court said (p.2 of the opinion): "It appears from the record that Helen Ridge, shortly after the divorce was granted, remarried and now has a home of her own; that at the time of the divorce

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she had no home and was working to make her living and could not care for her son and she consented at that time that the father have the custody of the child and to waive alimony. John E. Ridge did not claim that the mother is not a suitable person to have the custody of her son, or that the home which she now has is not suitable to take the boy while he would be visiting her, but says that she waived her right to the boy at the time of the divorce." This court, then, after citing several cases, referred to Nye v. Nye, 411 Ill. 408, where it is held that a party seeking a modification of the custody provisions of a divorce decree must show a change in condition affecting the welfare of the child since the entry of the decree and concluded: "It is largely under the discretion of the trial court after he has heard the evidence, to make the proper disposition for the child's care and custody. In the present case the father testified that the child was going to summer school and was busy practically all the time during the week. The judge evidently took this matter into consideration because the three days that he ordered the child delivered to the mother were on Sundays, and therefore would not interfere in any way with the child's schooling. The mother now has a suitable home in which she can entertain her own son, and she states that the conditions surrounding her former husband's home, made it undesirable for her to visit her son there. After John E. Ridge swearing that his former wife was a scatterbrain and a perjurer, the conditions surrounding a visit at his home would not be improved. It is our conclusion that the court properly found that it was for the best interest of the child that the mother be allowed to take him to her own home on the three days that were designated in the decree."

This opinion in Ridge v. Ridge, 1 Ill. App. 24, 226, was filed on January 28, 1954. In less than three months thereafter the instant petition was filed. It is not contended that conditions are any different now than they were on July 17, 1953, when the first modification order was entered. There is nothing in this record to indicate that the welfare of this nine-year-old boy requires ^{major or drastic} a modification of the provisions of the original decree. It is not insisted that the home appellant has provided for his son since he was between five and six years of age is not a good home. The only reason for modifying the original decree in any particular is to carry out the portion of its provisions which gave the mother the right to visit her child at reasonable times. Not to modify the decree in some particular is, for all practical purposes, as disclosed by this record, to nullify the right of the mother ever to have a satisfactory visit with her son, and we do not see how the son could be injured by being in his mother's home and in her company for comparatively short and infrequent periods of time. Certainly this boy should have an opportunity to at least get acquainted with his mother under circumstances other than at the home of her former husband.

In Bates v. Bates, 166 Ill. 448, Mrs. Bates was awarded a divorce on the ground that her husband was an habitual drunkard, and the custody of her five year old son was awarded to her. Seven months later the husband, having been denied the right to visit his son, filed his petition for a modification of the decree asking that he might have an opportunity for visiting the child and that the child might be allowed to visit him. Upon a hearing the decree was modified so as to give the father the custody of the child from five o'clock of Friday in each week to the same hour the following day. The evidence disclosed that the

mother was making her home with her father and his family and that the home was a comfortable one for her and her child. The father of the boy was a dentist and resided with his father who was a reputable physician and they lived in an equally comfortable and well appointed home. The mother of the boy and her family were exceedingly hostile to the father. The grandparents of the child on each side were willing to have the boy with them and were abundantly able to provide for his comfort in their respective homes. In affirming the judgement of the appellate court which affirmed the order of the circuit court, the supreme court said: (p.449) "Considering all the evidence we see nothing to indicate that the child would be injured by being in his (the father's) company for one day in each week. The home of appellee's father, to which it was proposed to take him, was a very suitable one. It was the right of the father to see his child at proper times and to secure and retain his affection if possible. We think the order was a proper one."

In *Roberts v. Roberts*, ^{4 Del. App. 2d, 134.} ~~Del. App. 2d, 134.~~ ~~in which an~~
~~opinion was recently filed in this court but not yet reported,~~
the wife had secured a divorce from her husband on the ground of adultery and the decree awarded to her the custody of two minor children, allowing the defendant to visit them at the home of the plaintiff at all times consistent with their education and health. Almost two years thereafter the father filed his petition to modify the decree and sought the care and custody of the children during the summer months and for one week during the Christmas vacation. The court found that the defendant had remarried and resided, at the time of the hearing, with his second wife and her minor child by a previous marriage: that he was a fit and proper person and adequately prepared to have visitation of his minor children in his own home:

that the mother of the children lives in Carthage, Illinois, a distance of 190 miles from Ottawa, Illinois, where the defendant resides and where the parties lived prior to their divorce, and directed that the children should visit and stay in the home of the father from June 26, 1954 to July 25, 1954 and during the same time of each year thereafter and for two days in each of the months of October and March with the right of the mother to visit said children when they were in the home of the defendant. In affirming this order this court said: "We do not believe that under the particular facts in the case before us the order of the trial court materially abridged the plaintiff's rights to the custody of the children. Certainly the chancellor should be allowed broad discretion when the question of altering visitation privileges is involved. (Wade v. Wade, 345 Ill. App. 170)."

The decree for divorce in Nye v. Nye, 411 Ill. 408, cited by appellant awarded the custody of a minor child in accordance with an agreement of the parties, which provided that the care and custody of the child should alternate yearly between the parties with reasonable visitation privileges to the other party. While the child was rightfully in custody of the mother under this decree the father took the child to his home without permission of the mother and contrary to the provisions of the decree. Thereafter the mother filed her petition for an order requiring the father to surrender the child to her, and the father filed a counterpetition praying for a modification of the decree so as to award him the sole care, custody and control of said child and depriving the mother of all visitation privileges. The evidence disclosed that Mrs. Nye had committed adultery with one Herbert Bruckner after her divorce from Nye and the trial court found that she was unfit to have the custody of the child and awarded its custody to the father with the exception of a

period from July 1 to August 15 of each year. The appellate court reversed the order of the circuit court and left the custody of the child as provided in the original decree, holding that Mrs. Nye's misconduct with Bruckner did not disqualify her as custodian of the child. In affirming the judgment of the appellate court, the supreme court stated that the decree awarding a divorce and custody of a child is a final order and is binding upon the parties under the same facts and so long as the same conditions exist and that new conditions must have arisen to warrant a court in changing its prior custody determination, but the custody of children after a divorce decree is always subject to the order of the court which enters the decree and may be changed as the best interests of the children demand.

In *Maupin v. Maupin*, 339 Ill. App. 464, also cited by appellant, it appeared that Mrs. Maupin secured a divorce from her husband on January 17, 1947, by default upon the ground of desertion, and the decree awarded the custody of their two minor children, a son and a daughter, to the father "without any interference on the part of the said plaintiff." Four months later the mother went to a hospital where the father had taken one of the children for a tonsillectomy and took her to her own home. A petition for contempt was filed by the father, and the mother filed a counterpetition for a modification of the decree asking that she be given the custody of both children. The petition for contempt was dismissed by the father, but he contested the petition to modify the decree. Upon a hearing, the mother of the children testified that at the time of the divorce hearing she was ill, had not established a home, and was in a

nervous condition; that at the time of the hearing (five months after the decree of divorce was rendered), she had regained her health, had a job and a suitable home. At the conclusion of the hearing, the chancellor purported to reserve his final decision but entered an order granting temporary custody of the daughter, three years old, to the mother. A year later the chancellor entered an order that the daughter should remain permanently with the mother and that the son should remain with the father. The father appealed. After reciting the foregoing facts and commenting upon a number of cited cases, the appellate court, in reversing the order appealed from, said (pp. 492-3):

"It is the policy of courts of review to recognize a broad discretion in a chancellor called upon to award custody of children, and perhaps even greater discretion is allowed in altering visitation privileges. But this policy cannot properly admit that a definite award of custody has no permanence or finality whatever. Changes in permanent custody (as distinguished from visitation privileges) should not be subject either to constant or spasmodic variation, merely to follow fluctuations in the health, employment, or residence of the party last deprived of custody, where the order was not conditional with respect to such changes. Accordingly, we hold that, if a divorce decree award custody unconditionally, a mere showing of change in conditions of the person deprived of custody is not sufficient to set aside or drastically modify such decree, in the absence of proof that the welfare of the children requires such a change. We find nothing in the record now before us indicating that the welfare

of the children required any change in the custody decree. The chancellor did not make any finding to that effect, but on the contrary, announced from the bench that the children had been receiving very good care."

So in the instant case, the original decree awarded custody of John E. Ridge, Jr., to his father subject to the right of the mother to visit her son at reasonable times. A showing of change in her condition is not sufficient to justify a drastic modification of this decree in the absence of proof that the welfare of the child required such a change. The original decree was modified by giving the mother custody for visitation purposes on three Sundays during the summer of 1953. That order was affirmed by this court but not until the times specified in the order had passed. Under the facts disclosed by this record, the mother should have the right to visit her son in her own home every third week from 9 o'clock A.M. Saturday to 5 o'clock P.M., the following Sunday afternoon during the months of May, June, July and August of each year and also for a one week period during the Christmas vacation period each year, and the order appealed from giving appellee the right to ^{have} her son in her own home on alternate holidays will be affirmed. That portion of the order, however, which awards to her the custody of her son from Saturday morning to Sunday evening every third week throughout the year is such a drastic and substantial modification of the original decree that it cannot be permitted to stand. The permanent custody of this boy is not altered by this modification.

There is nothing held in any of the cases cited by counsel for either party to which we do not approve. As said in Bates v. Bates, 166 Ill. 448, to confine appellee's visitation privileges solely to the home of her former husband would be to

of the children residing in the custody of the mother. The court did not find it necessary to find that the children, announced from the bench that the children had been receiving very good care."

So in the instant case, the original decree awarded

custody of John F. Baker, Jr., to his father subject to the right of the mother to visit her son at reasonable times.

Showing of change in her condition is not sufficient to justify a drastic modification of this decree in the absence of proof that the welfare of the child would be such a change. The

original decree was modified by giving the mother custody for visitation purposes on three Sundays during the month of 1952.

The mother was entitled to this right but not until the time specified in the order had passed. Under the facts disclosed

by this record, the mother should have the right to visit her son in her own home from 9 o'clock P.M. to 5 o'clock P.M.

on 2 o'clock P.M., the following Sunday afternoon during the months of May, June, and August of each year and also for

a one week period during the Christmas vacation period each year, and the mother requested that the court give her the right to visit her son in her own home on alternate Sundays with an affidavit that

portion of the order, however, which would be to give the custody of her son to her father, coming to court every other three weeks

throughout the year is such a drastic and substantial modification of the original decree that it cannot be permitted to stand. The

permanent custody of this son is not affected by this modification. There is nothing said in any of the cases cited by

counsel for either party to which we do not adhere. It is said

in Bates v. Bates, 166 Ill. App. 2d 111, 112, to modify appellee's visitation privileges under the name of her former husband would be to

imprison the mother in his home with her child for the short time she could endure such a visit.

We recognize that the discretion exercised by the chancellor in matters of this character should not ordinarily be disturbed by a court of review. The evidence found in this record is very meager, and it may be that upon a further hearing evidence may be offered which would justify the entry of an order granting appellee other visitation periods in her home.

The order of the Circuit Court is affirmed in part and reversed in part and this cause is remanded to the Circuit Court of Lee County with directions to enter an order as herein indicated.

Order affirmed in part and reversed in part,
cause remanded with directions.

CROW, J. Took no part.

transmission the machine in its normal state for any length of time and could not be used as a test.

We recognize that the discussion contained in the

transmission in matters of this character is not intended

to be disturbed by a change of system. The evidence given in this

record is very meagre, and it is not clear what further evidence

is required to be offered which would justify the action of the

order creating and the other relation periods in the same.

The order of the Board of Directors is not intended to be

reversed in part and this order is intended to be the same as

of the County with reference to the order as now in effect.

It is further stated that the order is not intended to be
changed in any way.

ORDER, 4. 1910 to 1911.

of the children required any change in the custody decree. The chancellor did not make any finding to that effect, but on the contrary, announced from the bench that the children had been receiving very good care."

So in the instant case, the original decree awarded custody of John E. Ridge, Jr., to his father subject to the right of the mother to visit her son at reasonable times. A showing of change in her condition is not sufficient to justify a drastic modification of this decree in the absence of proof that the welfare of the child required such a change. The original decree was modified by giving the mother custody for visitation purposes on three Sundays during the summer of 1953. That order was affirmed by this court but not until the times specified in the order had passed. Under the facts disclosed by this record, the mother should have the right to visit her son in her own home, and the order appealed from giving appellee the right to have her son in her own home on alternate holidays will be affirmed. That portion of the order, however, which awards to her the custody of her son from Saturday morning to Sunday evening every third week throughout the year is such a drastic and substantial modification of the original decree that it cannot be permitted to stand. So far as the permanent custody of this boy is concerned, the portion of the order which we affirm is not altered thereby.

There is nothing held in any of the cases cited by counsel for either party to which we do not approve. As said in *Bates v. Bates*, 166 Ill. 448, to confine appellee's visitation privileges solely to the home of her former husband would be to

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

imprison the mother in his home with her child for the short time she could endure such a visit.

We recognize that the discretion exercised by the chancellor in matters of this character should not ordinarily be disturbed by a court of review. The evidence found in this record is very meager, and it may be that upon a further hearing evidence may be offered which would justify the entry of an order granting appellee visitation periods in her home in addition to the alternate holidays, as provided in the order we are reviewing.

The order of the circuit court is affirmed in part and reversed in part as herein indicated. This cause is remanded to the circuit court of Lee County for further proceedings not inconsistent with this opinion.

Order affirmed in part and reversed in part,
cause remanded for further proceedings.

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Abstract

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

15 I.A.^{2d} 479

February Term, A. D. 1885.

General No. 9394

Agenda No. 3

Le Roy J. Fryman,

Plaintiff-Appellee,

vs.

Mary A. Fryman,

Defendant-Appellant.

Appeal from
Circuit Court of
Macon County.

REYNOLDS, J.

This is a contested divorce suit between LeRoy J. Fryman as plaintiff and Mary A. Fryman, as defendant. The plaintiff in his original complaint for divorce, charged extreme and repeated cruelty on the part of the defendant. This was later amended to include the charge of desertion for more than one year as provided by the Statute. The defendant denied the charges of cruelty and the charge of desertion. The cause was heard by the court, without a jury, and the court found the defendant guilty of extreme and repeated cruelty and desertion for more than one year, and decreed a divorce. In the decree the question of equity in the property owned by the parties was reserved for further consideration by

15 I.A. 179

RECEIVED
FEBRUARY 1961

February 1961, p. 1303.

Volume 1, p. 2

Volume 1, p. 2

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Volume 1, p. 2

This is a contested divorce suit between Mary J. Ryan and
William J. Ryan, as husband. The complaint in this
action contains no charges, charges which are required to
state the cause of action for such suit as provided
by the statute. The complaint merely states that the
marriage has become so broken down that it is no longer
possible to live together. The cause was set for trial and
the court found the defendant guilty of adultery and
guilty of cruelty and awarded her a divorce with custody
of the children. In the decree the question of equity in the property
was by the parties was referred for further consideration by

the court. The defendant appeals to this court and assigns as error that the decree is unsupported and contrary to the evidence; that the court erred in finding the defendant guilty of extreme and repeated cruelty and wilful desertion for more than one year; that improper evidence was admitted and proper evidence refused and that the decree is in variance with the law governing divorces on the grounds of extreme and repeated cruelty and wilful desertion.

It appears that the plaintiff and defendant were married in 1942 and lived together until 1952, when disagreements arose; that about the last of April or the early part of May, 1952, the husband left the home and has remained away ever since. There were no children born to the union but the defendant has a son by a previous marriage, who was adopted by the parties, named ~~Raymond Howard Fryman~~. The testimony of the plaintiff is that the defendant attacked him in the garage near their home, struck him on the head and arms and kicked him, without provocation, on or about March 21st, 1952; that later, on the 4th day of April, 1952 his wife had what he called "a raving fit", tried to break out the windows of the car and struck him on the head and body and kicked him; that the kicking on March 21, 1952 was done with the defendant wearing house-slippers but that the occasion of April 4, 1952, she was barefooted; that the kicks he received caused bruises and marks on his legs and that the legs got very sore; that on the 25th day of April, 1952, the defendant had another so called "raving fit", kicked, beat and struck him in the face with her fist;

the court, the defendant appears to this court and answers as
 error that the desire to investigate and conduct in the
 based; that the court would be finding the defendant guilty of
 excuse and repeated offense and which occurred for some time
 one year; that defendant's evidence was admitted and proper evidence
 returned and that the desire to be vindicated and the law governing
 directed on the grounds of evidence and evidence contrary and will
 find defendant.

It appears that the defendant and defendant were settled in
 1912 and 1913 defendant until 1913, when defendant's story
 that about the time of April of the early part of 1913, the
 defendant left the house and was residing with some friends. There
 were no children born in the house but the defendant was a son
 by a previous marriage, and was adopted by the mother, and
 defendant's mother. The testimony of the defendant is that the
 defendant attacked him in the house near their home, during the
 on the land and from the kitchen and defendant's presence, on or
 about March 21st, 1913; that later, on the 21st day of April, 1913
 his wife had been called to attend "Liz", and he went out
 the window of the room and threw him on the road and took him back
 and that the kitchen on March 21, 1913 was then with the de-
 fendant's mother and defendant and that the occasion of April 4,
 1913, was defendant; that the kitchen he received several injuries
 and when on his face and that the law was very good; that on the
 21st day of April, 1913, the defendant and another he called
 "Liz", and threw him in the sea with her first

that at that time, the defendant told the plaintiff to leave the home and helped him pack so he could leave. Plaintiff's evidence further showed that after the plaintiff left home, an altercation or struggle occurred in the presence of Mr. Harshman, the employer of the plaintiff and that at that time, the defendant grabbed the plaintiff, struck him and followed them in her car. It further appeared that the plaintiff at the instance of the defendant underwent a mental examination to determine his ability to handle his affairs but that the doctor stated there was nothing wrong with him; that afterwards, some sort of a warrant was sworn out against him by his wife and he had to be examined by a doctor before he could leave the court house.

Mr. Kenneth Harshman, in his testimony testified that he had seen the marks on Mr. Fryman's body and that they were slight red bruises on the shins and a bruise on the leg between the knee and ankle; that there was also a bruise on the cheek. He fixed the time as about the Spring of the year 1952, as to the bruises on the legs and the bruise on the cheek about a month later, and stated that Mr. Fryman had explained that he had been struck by his wife; that later, in May, 1952 he saw a scuffle between the plaintiff and the defendant; that the defendant was trying to get the plaintiff into her car; that in doing so, she grabbed his clothes; that he broke away and got into the Harshman car and that Mrs. Fryman followed them into town but nothing further happened. Mr. Harshman also testified that the plaintiff and defendant had had some arguments in his store and that he requested the plaintiff to keep Mrs. Fryman out of the store.

that at that time, the defendant told the plaintiff to leave the
home and helped him get to the court house. The plaintiff's evidence
further showed that after the plaintiff left home, an investigation
on a daily basis in the presence of Mr. Weinstein, the manager
of the plaintiff and that at that time, the defendant refused
the plaintiff, whom she had followed since 1937. It further
appeared that the plaintiff at the instance of the defendant under
went a mental examination to determine his ability to handle his
affairs and that the doctor advised there was nothing wrong with
him; that afterwards, some sort of a contract was made and signed
him by his wife and he had to be released by a doctor before he
could leave the court house.

Mrs. Gertrude Weinstein, in the testimony concluded that he had
seen the night on Mr. Pyron's wife and that they were slightly red
faced on this occasion and further on the day between the two and
while; that there was also a picture on the house. He said she
told me about the Spring of the year 1937, as to the picture on
one face and the picture on the house about a month later, and
stated that Mr. Pyron had concluded that he had been drunk by
his wife; that later, in May, 1937 he was a couple between the
plaintiff and the defendant; that the defendant was trying to get
the plaintiff into her car; that in doing so, she grabbed his
clothes; that he broke away and got into the bedroom and that she
Mrs. Pyron followed them into the room but seeing further occurred.
Mr. Weinstein also testified that the plaintiff and defendant had
had some argument in the case and that he remained the plaintiff
left to keep Mrs. Pyron out of the case.

The defendant denied striking her husband, or kicking him at any time. She denied that she asked him to leave and claimed that she asked him to stay and that when the plaintiff came for his clothes, she again asked and begged him to stay. The defendant testified that after the separation, she met her husband, went out with him for dinner and later they went to the home and had sexual relations; that she loaned the car to the husband and he kept it for two weeks; that when he returned the car, she again asked and begged him to stay; that in July 1952, after an argument over the car, the plaintiff hit her and knocked her glasses off and broke them; that the plaintiff had struck her on a number of occasions and threatened to strike her at other times. The defendant was vague as to the times but finally stated that one time was on March 3, 1951. Helen Britton in her testimony stated that in the Summer of 1952 the defendant's glasses were broken and there were some bruises on her arm. Mrs. Clifton Sams testified that she had observed bruises on Mrs. Fryman several times in April and June and that her glasses were broken. Mrs. Clifton Sams worked with the defendant at the Decatur Signal Depot. The son, Raymond Howard Fryman, testified that after the plaintiff and defendant split up, he saw the defendant and every time she came to see him and his wife, the defendant was bruised up a little more; that he never saw the plaintiff or defendant strike each other. The plaintiff in rebuttal denied having sexual relations with his wife on or about August 10, 1952; denied that he broke her glasses and denied that he ever struck her.

The defendant denied receiving her husband's or Richard's
at any time. The defendant also asked him to leave and stated
that she asked him to stay and that she was still with him for
his children, she would asked and begged him to stay. The defendant
and testified that after the separation, she was her husband,
went out with him for dinner and later they went to the home and
had sexual relations; that she learned the way to the husband and
he kept it for two weeks; that when he returned the way, she again
asked and begged him to stay; that in July 1952, after an argument
over the way, she testified that she and Richard had sexual relations
and from then until the defendant had sexual relations with a number of
occasions and returned to Richard for an affair. The defendant
further was sworn to by the State that she testified that she and Richard
was in March 3, 1951. The defendant is not testifying that she
in the summer of 1952 the defendant's children were present and there
were some children in her room. The defendant was testified that
she had observed Richard in her room several times in April and
June and that her children were present. The defendant was sworn
with the defendant at the District Court. The defendant, Richard
Howard, Richard, testified that after the defendant and defendant
split up, he saw the defendant and every time she came to see him
and the wife, the defendant was provided with a little money; that he
never saw the defendant or defendant's children again. The defendant
still in contact denied having sexual relations with his wife on
or about August 10, 1952; denied that he knew her children and
denied that he ever visited her.

The appeal raises the question of whether or not the plaintiff proved extreme and repeated cruelty as required by the statute. If such proof was produced, then it will be unnecessary to consider the other charge. The defendant did not file a cross-complaint and the only effect of the testimony about the plaintiff striking her would be to refute the allegation of the plaintiff that he had conducted himself toward his wife as a true, affectionate and dutiful husband. The cause being in equity, the plaintiff must come into court with clean hands. He must not be guilty of doing the very acts that he charges against the wife. The testimony on this point is very inconclusive. The defendant testified that the plaintiff had struck her and broken her glasses, but when asked for dates was very vague and finally testified as to one date only. There is testimony by Helen Britton, Mrs. Clifton Sams and Raymond Howard Fryman, that they observed the bruises but there is no testimony as to what caused the bruises. Evidently the trial court was not impressed by this line of testimony, since in his summation of the evidence and the reasons for his decree, he does not mention it. The trial court does note that the defendant testified as to having dinner and afterwards, at the home having sexual relations with her husband on a certain date and it afterwards developed that she was in a hospital on that date.

In considering the degree of proof necessary for a decree of divorce on the grounds of extreme and repeated cruelty, the degree is the same as in all other cases of like nature, and the plaintiff is required to prove his case by a preponderance of the evidence. Rieso v. Rieso, 330 Ill. App. 428. Here the plaintiff

The appeal raises the question of whether or not the plaintiff will prove all the facts and requested credits as required by the statute. If such proof was produced, then it will be unnecessary to consider any other charges. The defendant did not file a cross-complaint and the only effect of the testimony about the plaintiff's activities would be to reduce the allegations of the plaintiff that he had conducted himself toward his wife as a cruel, malicious, and brutal husband. The same being in equity, the plaintiff must come into court with clean hands. He must not be guilty of doing the very acts that he charges against his wife. The testimony on this point is very inconclusive. The defendant testified that the plaintiff had sexual intercourse with her, but when asked for dates was very vague and finally testified as to one date only. There is testimony by Helen Wilson, Mrs. William Jones and Raymond Howard Brown, that they observed the couple but saw no testimony as to what caused the divorce. Without the trial court was not impressed by this line of testimony, since in the summation of the evidence and the reasons for his action, he does not mention it. The trial court does not find the defendant testified as to having intercourse and otherwise, at the same having sexual relations with her husband on a certain date and it is therefore believed that she was in a hospital on that date.

In considering the degree of proof necessary for a decree of divorce on the grounds of extreme and repeated cruelty, the law is the same as in all other cases of like nature, and the plaintiff is required to prove his case by a preponderance of the evidence. Allen v. Richardson, 330 Ill. App. 413. Here the plaintiff

testified as to three separate acts of physical violence. The testimony of the plaintiff is corroborated by his employer, who stated that on different occasions he saw bruises on Mr. Fryman and that Mr. Fryman told him his wife had inflicted them. It must be conceded that physical violence must be alleged and proved. The word "cruelty", as used in the statute means physical cruelty, such as hitting, kicking, striking, biting, choking or some other means of physical violence that causes pain and suffering. There is no distinction as to sex. The wife may be guilty of extreme and repeated cruelty, just the same as the husband. As it was stated in Levy v. Levy, 388 Ill. 179 at page 183: "Both parties are governed by the same statute which draws no distinction because of sex, but in fact states that a divorce may be had where 'either party *** has been guilty of extreme and repeated cruelty'." Each case must be considered on its own facts, taking into consideration the conduct of the parties before and at the time of the provocation, if any, the physical and mental condition of the parties, their circumstances and temperaments and all the circumstances relating to the acts at the time of their commission. Teal v. Teal, 324 Ill. 207.

The language of the statute makes it necessary that there be physical violence to the other spouse at least twice, since to constitute a ground for divorce, the cruelty must be extreme and it must be repeated, that is, more than once, or such acts that endanger life or limb or such as raise a reasonable apprehension of great bodily harm.

Each case must of necessity, rest upon its own facts. Each

established as an abuse against acts of physical violence. The
 testimony of the plaintiff is corroborated by his employer, who
 stated that on different occasions he was driven on his fingers
 and that Mr. Ryan told his wife had inflicted them. It
 must be conceded that physical violence may be inflicted and proved.
 The word "excess", as used in the statute means physical excess,
 such as hitting, kicking, twisting, beating, or using other
 means of physical violence than common and ordinary. There
 is no distinction as to law. The wife may be guilty of extreme
 and repeated cruelty, and the same as the husband. It is now
 stated in Gray v. Gray, 328 Ill. 179 at page 181: "While parties
 are governed by the same statute which treats an association be-
 cause of want but in fact makes them a divorce may be had where
 'either party has been guilty of extreme and repeated cruelty'."
 Each case must be considered on its own facts, taking into con-
 sideration the conduct of the parties before and at the time of the
 association, if any, the physical and mental condition of the parties,
 their circumstances and treatment and all the circumstances re-
 lating to the case at the time of their association. Gray v. Gray,
 328 Ill. 179.
 The language of the statute makes it necessary that there be
 physical violence to the other spouse at least once, since to
 constitute a ground for divorce, the cruelty must be extreme and
 it must be repeated, that is, more than once, or such facts
 entangle him or her as to make a reasonable expectation
 of great bodily harm.
 Each case must of necessity, rest upon its own facts. Each

wife and each husband, as an individual, represents something that must be considered individually. What might be rude play to one could be extreme cruelty to another. The force of the blows complained of, can hardly be measured by a single yardstick. The physical well being and condition of each party may well be a decisive factor. The demeanor of the witnesses on the stand, and their attitude may well be considered. All these considerations make it increasingly important that the reviewing court should not disturb the ~~verdict~~ of a trial judge that heard the witnesses, observed them on the witness stand, and rendered a ~~verdict~~ thereon, unless the ~~verdict~~ is clearly and palpably against the manifest weight of the evidence. The law is well settled that where the evidence is conflicting, the findings of the chancellor will not be disturbed unless it is clearly against the preponderance of the evidence. Arliskas v. Arliskas, 343 Ill. 112.

In the Arliskas case, as in this case, the chancellor saw the witnesses and heard them testify and was in a much better position to determine their credibility than we are. A court of review will not disturb the findings of fact of the chancellor under such circumstances unless it is apparent that error has been committed. In Bellm v. Henry, 336 Ill. App. 525, at page 532, the court in its opinion quoted from the case of Chamblin v. New York Life Ins. Co., 292 Ill. App. 532, at page 538, as follows: " 'It is further the rule that where the testimony merely conflicts, the reviewing court may not substitute its judgment for that of the trial court. People v. Oberbey, 362 Ill. 488; People v. Martishuis, 361 Ill. 178.

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 must be considered individually. It should be truly to one
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 on, unless the verdict is clearly and palpably against the evi-
 dent weight of the evidence. The law is well settled that where
 the evidence is conflicting, the findings of the chancellor
 will not be disturbed unless it is clearly against the prepon-
 derance of the evidence. Arkansas v. Williams, 362 Ill. 115.
 In the Arkansas case, on this case, the chancellor saw the
 witnesses and heard them testify and was in a much better position
 to determine their credibility than we are. A court of review
 will not disturb the findings of fact of the chancellor under such
 circumstances unless it is apparent that error has been committed.
 In Boyle v. Henry, 336 Ill. App. 525, on page 535, the court in
 the opinion quoted from the case of Quinn v. New York Life Ins.
Co., 292 Ill. App. 532, at page 535, as follows: "It is further
 the rule that where the testimony merely conflicts, the reviewing
 court may not substitute its judgment for that of the trial court."
People v. O'Donoghue, 362 Ill. 485; People v. Martin, 361 Ill. 175.

In order to warrant interference with the finding it must appear that the judgment is contrary to the manifest weight of the evidence. Kuehne v. Malach, 286 Ill. 120; Tarjan v. Regelin, 202 Ill. App. 320; Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183.' "

The trial court here found the evidence sufficient to enter a decree for divorce on the grounds of extreme and repeated cruelty. This court will not attempt to substitute its judgment for that of the trial court, and the decree will be affirmed.

Affirmed.

in order to meet the needs of the community and to provide a better environment for the people of the community.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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Abstract

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I.A.^{2d} 480

Gen. No. 10806

Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
FEBRUARY TERM, A. D. 1954⁵,

MARIE R. CALLAN,
Plaintiff-Appellant,)
vs.)
JOHN W. CALLAN,
Defendant-Appellee.)

Appeal from the
Circuit Court of
DuPage County.

WOLFE,-- P. J.

On the 13th day of May 1949, Marie R. Callan procured a divorce from John W. Callan in the Circuit Court of DuPage County, Illinois. The grounds for the divorce was the extreme and repeated cruelty of John W. Callan toward his wife, Marie Callan. The parties had a son named John W. Callan, Jr., age three years at the time of the divorce. The Court found that Marie R. Callan was a proper person to have the care and custody of their minor son and the decree gave her such custody. The father was ordered to pay the sum of \$65 per month.

In February 1954, Marie R. Callan filed a petition in the Circuit Court of DuPage County, to have the decree of divorce modified, in that she asked to have the payments

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IN THE

STATE COURT OF ILLINOIS

IN AND FOR THE COUNTY OF JEFFERSON

1930

Special Order of
Circuit Court of
Jefferson County.

WILLIAM E. GALLAN,
Plaintiff -
vs.
JAMES W. GALLAN,
Defendant.

1930

On the 15th day of May 1930, James E. Gallan was

granted a divorce from James W. Gallan in the Circuit Court

of Jefferson County, Illinois. The grounds for the divorce was

the extreme and reasonable cruelty of James W. Gallan toward his

wife, James E. Gallan. The parties had a son named James W. Gallan,

10, who was born on the 15th of the divorce. The Court

found that James W. Gallan was a proper person to have the care

and custody of their minor son and the father was ordered

to pay the sum of \$50 per

month.

In February 1930, James E. Gallan filed a petition

in the Circuit Court of Jefferson County, to have the decree of

divorce modified, in that he asked to have the

2.

heretofore ordered of \$65 per month, increased and that the visitation periods, which the trial court had allowed the defendant, be changed, and that he be restrained from entering her apartment when he called for the child. In her sworn petition she named numerous acts of improper conduct on the part of the former husband and that some of them endangered the life of their child.

The defendant filed his answer in which he denied all acts of misconduct on his part, and denied that his former wife was entitled to any increased payments for the support of the child. He filed a counterclaim in which he alleged that the child was not properly cared for and that he was the proper party to have the care and custody of the child and was so situated that he could give their son a good and proper home, and asked to have the child support decreased.

A hearing was had before the Court and at the conclusion thereof, the Court found that at that time the mother of the child was unable to give the child adequate supervision, in that the said child was without supervision for a portion of the working day; that John W. Callan, the father, was a fit and proper person to have the custody of the said minor child, and that the present support payments should be modified. The decree provided "that John W. Callan have custody of said minor child from Sunday at 7 P.M. until Friday at 7 P.M. of each week, provided he and said minor child reside at residence, Edward Martin, 334 S. Adams, Westmont, Illinois; that Marie R. Callan have custody of said child 7 P.M. on Friday to 7 P.M. on Sunday of each week all until further order

[illegible]

... and I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
Your obedient servant,
J. H. [Signature]

On Monday, January 14, 1968, the following information was received from the Chicago Police Department regarding the above captioned case:

The Chicago Police Department has advised that on January 13, 1968, at approximately 10:00 P.M., a male individual, approximately 30 years of age, was seen walking alone on the sidewalk of the intersection of North LaSalle Street and North Dearborn Street, Chicago, Illinois. The individual was wearing a dark overcoat and a dark hat. He was walking in the direction of North Dearborn Street. The individual was seen by a police officer who was patrolling the area. The officer stopped the individual and searched him. A search of the individual's pockets revealed a small, dark, rectangular object which the officer identified as a wallet. The wallet contained a driver's license for the name of [redacted] and a small amount of cash. The individual was taken to the Chicago Police Department and is currently being held in custody. The Chicago Police Department is currently conducting an investigation into the individual's identity and the circumstances surrounding his arrest.

3.

of this Court; that Marie R. Callan be given child support payments in the amount of \$25.00 per month payable on the 11th and 26th days of each month." To reverse this decree, Marie R. Callan has prosecuted an appeal to this Court.

The appellant called several witnesses who testified on her behalf and she also testified in regard to the care of the child and the behavior of John W. Callan when he would come to call for the child. The Court filed the report of the probation officer of said Court, who had made an investigation of the surroundings of the minor child, and she recommended that the father be given the custody of the child. The appellant now contends that it was error for the Court to admit the probation officer's report in evidence, as she had no way of questioning her, where she obtained her information, and that her recommendation in regard to the care of the child should have no binding effect upon the parties to the suit; that it is for the Court to decide what is for the best interest of the child upon the facts as presented in Court.

In the case of Des Chatelets vs. Des Chatelets, 292 Ill. App. 357, it is stated: "The Court, however, was undoubtedly not satisfied with the evidence before him, and from the record it is indicated that he considered what he terms a 'confidential report from the social service department.' Whatever this may have been, does not appear from the record, and of course, we are unable to consider it. However, the record indicates that the Court did consider it, and stated that he based his finding upon it. We are of the opinion that he was in error in so doing."

As in the instant case, there was other evidence aside from this report, but here the report is in evidence and whether it is true or not, the appellant had a right to question it, and we think the Court erred in admitting it in evidence.

In the case of *Nye vs. Nye*, 411 Ill. Page 408, the Court lays down principles of law that have been followed repeatedly by the Supreme Court and the Appellate Courts of each district in Illinois. It is there stated: "It is true that the chancellor is given a large discretion in awarding custody of minor children. However, such discretion is a judicial one and not unlimited. It is subject to review. *Cohn v. Scott*, 231 Ill. 556.

"After a divorce decree in this State the custody of the children is always subject to the order of the Court which enters the decree and may be changed from time to time as the best interests of the children demand. The decree is res judicata as to the facts which existed at the time it was entered but not as to facts arising thereafter. (*People ex rel. Stockham v. Schaedel*, 340 Ill. 560.) In proceedings involving child custody the order of the court or judge having competent jurisdiction is a final order, and is binding upon the parties under the same facts and so long as the same conditions exist as did at the time of the hearing and order. (*Cormack v. Marshall*, 211 Ill. 519.) New conditions must have arisen to warrant the Court changing its prior custody determination, (*Stafford v. Stafford*, 299 Ill. 438,) where the court was not imposed on by perjury or collusion of the parties."

is in the instant case, before the other evidence is before the jury, but before the report is made, and before it is time for the jury to return its verdict. It is, therefore, a question of fact, and we think the court should be satisfied in evidence.

In the case of *Wheeler v. Wheeler*, 111 Ill. 200, 201.

The court says: "The evidence of the fact that the defendant was not a party to the transaction is not sufficient to establish the fact that the defendant was not a party to the transaction. It is a question of fact, and it is subject to the verdict of the jury." *Wheeler v. Wheeler*, 111 Ill. 200, 201.

"It is a question of fact, and it is subject to the verdict of the jury." *Wheeler v. Wheeler*, 111 Ill. 200, 201.

of the defendant's alleged conduct to the order of the court. The court says: "The evidence of the fact that the defendant was not a party to the transaction is not sufficient to establish the fact that the defendant was not a party to the transaction. It is a question of fact, and it is subject to the verdict of the jury." *Wheeler v. Wheeler*, 111 Ill. 200, 201.

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In the case of Maupin vs. Maupin, 339 Ill. App.

484, a similar question as the one we are considering was before the Appellate Court of the Fourth District, and after the divorce, the custody of the minor children was given to the father. The mother filed a petition to change the custody of the children, and have the decree modified. There, as here, the report of the probation officer was introduced in evidence. In the opinion we find the following: "It would seem this contention may have merit, but it should be noted the final order of the court purports to recite the substance of the officer's report, and if such was the report, it certainly was innocuous as to appellant. As a result, taking the order at face value, it merely purports to find that both parents are fit and both homes are suitable; therefore, one child is awarded to each parent. Such a finding and order might have been proper on the original hearing, but in this case there had already been a final adjudication awarding custody to the father, and the only thing properly subject to decision by the chancellor on this proceeding was whether there had been such a change in conditions, in the few months elapsed, that the best interests of the children required a change in the order.

"The Illinois Divorce Act authorizes the Court from time to time to make alterations in the custody of children and in allowances for alimony and support as shall appear reasonable and proper. Ill. Rev. Stat. ch. 40, sec. 18, par. 19 (Jones Ill. Stats. Ann. 109.186). However, it has long been recognized that the decree in the divorce case is final as to conditions then existing. This was the decision of the Supreme

In the case of *Marriage v. Marriage*, 171 Ill. 400.

It is a familiar proposition in law that we are bound by the law as it is, and not by the law as it ought to be. The law is the law, and we must follow it, and after the divorce, the custody of the child was given to the mother. The mother filed a petition to change the custody of the child, and

and was not deemed entitled. There, at least, the petition of the petitioner was dismissed as inadvisable. In the opinion

we find the following: "It would seem that the petition was timely, but it should be noted that the petition was filed after the

order to vacate the judgment of the circuit court, and it was not the petition, it was the petition, and it was not the petition.

As a result, having been given to the court, it was not the petition, it was the petition, and it was not the petition.

To find that both parties are the same person and entitled; therefore, one child is awarded to each parent. And a finding

and order that have been given to the court, and it was not the petition, it was the petition, and it was not the petition.

In this case there had already been a final judgment rendered in the custody of the child, and the only thing properly subject

to decision by the court on this proceeding was whether there had been such a change in conditions, in the law, as to require that the best interests of the child required a change in the order.

"The Illinois Divorce Act authorizes the court to

make to the best advantage in the custody of the child

and in all cases for alimony and support as shall appear reasonable and proper. Ill. Rev. Stat. ch. 40, sec. 15, par.

19 (Jones Ill. Stat. Ann. 100, 105). However, it has long been recognized that the same in the divorce case is that as to

custody of the child, and the decision of the court

Court in *Cole v. Cole*, 142 Ill. 19, with respect to alimony, for the reason that, if this were not the rule, then the same or some succeeding chancellor, presiding in the same Court, would have power to review, and to reverse, alter, or modify a decree, upon the facts existing at the time of its entry."

This Court in the case of *Wade vs. Wade*, 345 Ill. App. 170, had occasion to pass upon the exact question as now presented in this appeal, and quoted with approval *Maupin vs. Maupin*, *supra*, and *Nye vs. Nye*, *supra*.

The question then arises, what were the changed conditions on which the chancellor based his decree? At the time the original decree of divorce was signed, the chancellor and the appellee certainly knew that the mother of the child could not support it, unless she had an independent income, or that she would be compelled to work to support herself, while she was taking care of the minor child. It now appears that she has a position and earning her own living, but any one being regularly employed could not give her full time to the care of her minor child. She asked the Court for additional support money for the child so that during his vacation periods he could be sent to a summer school or camp. The cases all hold that there must be a material change in the conditions that existed at the time of the hearing from the ones at the time the original divorce decree was entered, and the custody of the child given to the mother. It is our conclusion that the Court erred in changing the custody of the child during the week days from the mother to the father.

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There was considerable evidence introduced as to the habits and conduct of the appellee when he would come to get the child, as provided in the original decree of divorce. The evidence is somewhat conflicting, but it certainly preponderates in favor of the appellant that he caused a disturbance when he visited the apartment of Mrs. Callan to get the child. Whether he is a fit and proper person to have the custody of the child, we do not pass upon that question, as we find that the case must be reversed on other grounds, but we do find that Mrs. Callan is entitled to have an order of Court restraining her former husband from visiting her apartment when he comes to get the child, as provided in the former decree. We also think that there should be an increase of support for the boy so that he can be better cared for during the vacation periods. The decree appealed from is reversed, and the cause remanded to the trial Court to make such orders not inconsistent to the findings of this Court.

Reversed and remanded.

There was considerable evidence introduced as to

the nature and conduct of the business done on which some

to get the call, as provided in the original letter of

dispute. The evidence is somewhat conflicting, but it is

being presented in view of the fact that the

a distance that he visited the apartment of Mrs. Callan for

get the call. He also says he did not go to the

the conduct of the call, as he did not go to the

as we find that the call was not made at that time,

but we do find that the call was made at that time

of some testimony for the purpose of showing that

apartment when he came to get the call, as provided in the

former letter. It also shows that there was no

of money for the day on which he did not come to

during the vacation period. The doctor explained that the

to the house, and the house was not to be used as a

order not inconsistent with the findings of this Court.

Reversed and remanded.

Abstract 5 I.A.²⁹ 481

5 I.A. 481

AGENDA NO. 6

FEBRUARY TERM, A. D. 1955

Plaintiff-Appellee.

Appeal from

WILLIAMS COUNTY.

Defendant-Appellant

The plaintiff-appellee, Mary Dunivant, filed her suit for divorce in the Circuit Court of Winnebago County, June 27, 1953 against Joe Dunivant, defendant-appellant, charging him with extreme and repeated cruelty, setting forth two specific instances of physical injury alleged to have been inflicted by the defendant, and charging habitual drunkenness for a period of two years prior to the filing of the complaint. In addition to asking for divorce, she asked for approval of a property settlement concerning certain property rights and for alimony for her care and support. The defendant, by counsel, moved to dismiss the complaint on the grounds of insufficiency, and the Court denied the motion. The defendant then filed an answer denying all the charges and set forth certain alleged affirmative defenses, namely, provocation by

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ALVIN KARPIS

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Page 1

The following is a summary of the evidence presented at the trial of Alvin Karpis and his associates. The evidence shows that Karpis was the leader of a gang of criminals who were active in the United States and Canada. The gang was responsible for a number of bank robberies and kidnappings. The evidence also shows that Karpis was involved in the planning and execution of these crimes. The evidence is as follows:

1. The evidence shows that Karpis was the leader of a gang of criminals who were active in the United States and Canada. The gang was responsible for a number of bank robberies and kidnappings. The evidence also shows that Karpis was involved in the planning and execution of these crimes.

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the plaintiff and condonation by the plaintiff. The plaintiff filed a reply denying the new matter alleged in the answer. On January 6, 1954 a hearing was had on the complaint, answer, and reply, plaintiff and defendant both being represented by counsel in open Court, and in the course of the hearing the plaintiff withdrew the evidence as to drunkenness. After evidence taken, the Court, on January 28, 1954, granted a decree of divorce on the grounds of extreme and repeated cruelty only, and, in the decree, approved the property settlement which had been previously entered into between the parties and directed the defendant to sign the necessary papers to perfect title in the plaintiff. On February 26, 1954, the defendant filed a motion, supported by an affidavit, to vacate the decree of January 28, 1954 and in his motion claimed, among some 18 different grounds, that (1) he was denied a right to a hearing; (2) he was not given an opportunity to appear and testify; (3) he did not have notice of the hearing; (4) he was deprived of his property without due process of law; and (5) the plaintiff had given false testimony with respect to her charge of extreme and repeated cruelty. The balance of the grounds stated in that motion and affidavit we consider either to be irrelevant to the material issues, or already adequately preserved otherwise in the record as points of argument for the defendant, or as matters we shall later discuss in connection with the decree, pleadings, and evidence. The Court on April 29, 1954, counsel for both parties being present, passed upon the motion to vacate and denied the same. There is nothing in the record to indicate that any evidence was taken at the hearing on the motion to vacate the decree.

From the decree of divorce and the order denying the motion to vacate the same, the defendant appeals upon the following alleged grounds: (1) the complaint is substantially insufficient in law; (2) the plaintiff failed to establish her case by a preponderance of the evidence; (3) the defendant was denied a fair trial; and (4) the Court erred in denying the motion to vacate the decree. The plaintiff has filed no brief in this Court and is not represented here.

Mary Dunivant, the only witness for the plaintiff or defendant, testified in her own behalf to the effect that on December 31, 1949, her husband, the defendant, hit her with his fist on her head, hurting her and causing pain and suffering; on December 8, 1951 he pulled her out of a car, slung her on the ground hurting her hip, by reason of which she had to go to a hospital, - she couldn't struggle with the defendant because he was a large man; she did not live with the defendant as husband and wife after December 8, 1951; she gave her husband no reason or cause for what he did in those respects; after December 8, 1951, the date of the last act of cruelty charged, she and her husband occupied the same premises, but not as husband and wife, and each slept in a separate bedroom; after December 8, 1951 he threatened her and called her names; and he was drunk nearly every week and more than once or twice each week, for more than two years prior to June 27, 1953, and since August 4, 1947. She further testified that the defendant did not want any of the household furnishings and that she and the defendant had entered into a property settlement agreement concerning the residence real estate being purchased on a contract, known as 2120 Christina Street, Rockford, Illinois, by which agreement she paid the defendant the sum of \$500.00 "in full to my satisfaction in anything I have in connection

from the house of divorce and the other carrying the

motion to recall the same, the defendant appears upon the

following affidavits: (1) The complaint is untrue and

is manifestly in fact; (2) The plaintiff failed to make

his case up to the requirements of the evidence; (3) The de-

fendant was injured a fair trial; and (4) The court tried in

accordance with the law in regard to the divorce. The plaintiff was

advised no trial in this court and is not represented there.

Very Respectfully, the only witness for the plaintiff as

defendant, testified in her own behalf to the facts stated on

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and on December 31, 1949, he failed to sign the same, and the

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with 2120 Christina Street, and Mary herself --". She agreed to pay a balance of some \$2900.00 due on the contract therefor. She also waived alimony and attorney's fees. The defendant does not allege or prove any circumstances of fraud or over-reaching by the plaintiff in connection with the property settlement. The plaintiff was cross examined at the divorce hearing by counsel for the defendant. The defendant himself was not present in person at the hearing. No evidence was offered by or on behalf of the defendant other than calling the plaintiff as an adverse witness under Section 60, of the Civil Practice Act.

We have examined the allegations in the complaint as to the grounds of extreme and repeated cruelty, and there is no merit in the claim that it is substantially insufficient in law. The Civil Practice Act, CH. 110 Ill. Rev. Stats., 1953, pars. 157 and 166, provides, so far as material:

"157. (Civil Practice Act, Sec. 33.) Form of pleadings.

(1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply.

(3) Pleadings shall be liberally construed with a view to doing substantial justice between the parties."

"166. (Civil Practice Act, Sec. 42.) Insufficient pleadings.

(2) No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet."

Paragraph IV of the Complaint, the only part presently material reads:

"That defendant has been guilty of extreme and repeated cruelty toward the plaintiff on numerous occasions; that instances of such cruelty are as follows:

(a) That on December 31, 1949, defendant, while angry, struck the plaintiff about her head and face with his hands and fists, injuring her and causing her great pain and suffering;

(b) That on December 8, 1951, defendant, while angry, struck the plaintiff about her head and face with his hands and fists, injuring her and causing her great pain and suffering;

(c) That since the last (act) of cruelty, defendant has pursued a wrongful course of conduct toward the plaintiff, by drinking to excess, calling her vile and opprobrious names, and making threats upon her personal safety, so that it has affected the health and general well-being of the plaintiff;

That defendant's conduct as aforesaid was without cause or provocation on the part of the plaintiff;"

We think that, construing the pleading in accordance with the principles of the Civil Practice Act, the complaint contains a plain and concise statement of the pleader's cause of action, it contains such information as reasonably informs the defendant of the nature of the claim which he is called upon to meet, and that such construction does substantial justice between the parties.

The allegations in the complaint as to the residence real estate are, in substance, that the plaintiff was purchasing the same prior to the marriage, had made all the payments on the contract since, and desired the exclusive occupancy thereof in order to provide a home for herself. Those, together with the evidence summarized above as to the parties' property settlement agreement concerning the real estate and the defendant's waiver of any claim to the household furnishings, sufficiently indicate the defendant may hold some ostensible title or interest therein equitably belonging to

the plaintiff, which he may be directed to convey (CH. 40 ILL. REV. STATS., 1953, par. 18), and sufficiently indicate special circumstances and existing equities to justify such conveyance.

After reviewing the evidence we believe that the plaintiff did not fail to establish her case on the grounds of extreme and repeated cruelty and we believe that the decree is in that respect not against the manifest weight of the evidence. On complaint and answer, and evidence taken, there being no default and the complaint not being taken as confessed, and there being no evidence offered by the defendant, a decree may properly be granted on the uncorroborated testimony of the plaintiff, if the Court believes the same and believes that is where the weight of the evidence lies; and Section 8 of the divorce statute (CH. 40 ILL. REV. STATS., 1953, par. 9) to the effect that if the bill is taken as confessed the cause shall be heard "by examination of witnesses" and that in case of default the cause of divorce must be "fully proven by reliable witnesses", has no application to a case such as the case at bar: DOOSE v. DOOSE (1921) 300 Ill. 134; MOLNER v. MOLNER (1914) 186 Ill. App. 233. The plaintiff's continuance of marital relations with the defendant after his act of cruelty of December 31, 1949, up to December 8, 1951, was, if it were considered to be thereby condoned, subject to the implied condition that the offense would not be repeated, and the repetition thereof by the second act of cruelty of December 8, 1951, was a revival of the prior act: LIPE v. LIPE (1927) 327 Ill. 39. Extreme and repeated cruelty means acts of physical violence producing bodily harm, and each case must be considered upon its own facts, considering the

character of the violence, the manner of the person committing it, the situation physically, and otherwise, of the parties concerned, and all the circumstances attending such acts. In the state of this record, the plaintiff's testimony being the only evidence, and it being undisputed, we cannot say, as a matter of law, that the acts proven, evidently done in anger and without provocation, are not extreme and repeated cruelty, or that the decree so finding is against the manifest weight of the evidence.

If condonation by the plaintiff is relied upon by the defendant as an affirmative defense, as it is here, the burden is on the defendant to support the alleged defense by evidence: KLEKAMP v. KLEKAMP (1916) 275 Ill. 98; LIPE v. LIPE, supra. We do not believe, under the circumstances here and in the light of all the evidence, that condonation is necessarily to be presumed from the fact that the parties lived in the same premises after December 8, 1951 and after the filing of the complaint until the time of the hearing.

Condonation is largely a question of intent and it is not a defense which can be reduced to any exact formulae. It means, in essence, the full, free forgiveness of a past matrimonial offense upon condition that it will not be repeated. That the parties may thereafter live in the same premises is a matter to be considered in determining whether there has been condonation but it is by no means the only thing to be considered, - all other material facts and circumstances in evidence bearing on the question must be given proper weight and consideration also. The Trial Court, having, as we do not, an opportunity to observe the conduct and demeanor of the witnesses while testifying, must primarily

determine their credibility and the weight of the evidence. The plaintiff's attitude did not possess all of the necessary ingredients of condonation, - there seems to have been no free, voluntary, and full forgiveness and remission of prior matrimonial offenses: MOGAUGHY v. MOGAUGHY (1951) 410 Ill. 596; MATERS v. MATERS (1905) 121 Ill. App. 400. Condonation is not so strict a bar against a wife as against a husband, inasmuch as she may find it difficult to quit the common domicile, and often remains through necessity: DUBERSTEIN v. DUBERSTEIN (1897) 171 Ill. 133. Further, here, in view of the parties' property settlement, the plaintiff would appear at the time to have been the sole owner of the domicile, as between her and the defendant, and she was obviously entitled to live there if she wished.

Lastly, we do not believe the defendant was denied a fair trial, a right to a hearing, or an opportunity to appear and testify. This case was set for hearing with knowledge of counsel for the defendant on January 4, 1954 and continued until January 6, 1954. Counsel for the defendant was present at the hearing, participated in the trial, cross examined the plaintiff, and examined the plaintiff under Section 60. During the rather lengthy cross examination and examination of the plaintiff under Section 60 there was more than ample opportunity for the defendant's attorney to get the defendant into the Court Room, if that was desired, and the Court specifically asked counsel if he wanted to call the defendant, but apparently counsel did not do so. The record does not disclose that counsel for the defendant prior to the taking of testimony at the hearing or at any time made any motion at all, supported by affidavit, for a continuance of the setting, giving any

claimed reason for a continuance. The defendant was not prevented by the plaintiff or the Court from being present in person and testifying or adducing any other evidence he desired. A party having notice, through his counsel, of a hearing must be prepared to go forward at that time with whatever evidence he desires to present unless he sees fit in apt time and proper manner to request a continuance of the setting and the court so continues it. Neither the defendant or his counsel saw fit to follow the ample provisions of the Civil Practice Act and Rules (Ch. 110, ILL. REV. STATS., 1953, pars. 183 and 259.14) for the presentation of a request for additional time or continuance. Under such circumstances, it cannot be said the defendant was deprived of his rights and property without due process of law.

We have carefully considered the motion to vacate the decree and the affidavit in support thereof, and we cannot say that the denial of the motion by the Trial Court was, under the circumstances, an abuse of discretion.

Under CH. 77 ILL. REV. STATS., 1953, par. 83, it is provided that:

"83. Vacation, modification of judgment.) Sec. 2. Any such judgment, decree or order may hereafter be modified, set aside or vacated prior to the expiration of thirty days from the date of its rendition or in pursuance of a motion made within such thirty days, where-ever, under the law heretofore in force, it might have been modified, set aside or vacated prior to the expiration of the term of court at which it was rendered or in pursuance of a motion made at that term."

And under the Civil Practice Act, CH. 110 ILL. REV. STATS., 1953, par. 174(7), it is provided that:

"174. Sec. 50. (Judgment for or against some of the parties - Execution - Review - Counterclaim - Abatement - Default - Confession - Setting aside judgment or default.)

(7) The court may in its discretion before final

judgment, set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable."

Whether or not a court should, within 30 days of its rendition, vacate and set aside a judgment, decree, or order rests in the sound legal discretion of the Court, depending on the facts presented, and it is only where that discretion is abused or improperly exercised that a court of review will reverse the trial court's action in denying or permitting a vacating thereof: VILLAGE OF LAGRANGE PARK v. HEES ET AL. (1928) 332 Ill. 236; PEOPLE ex rel. v. CHICAGO etc. R. R. CO. (1921) 301 Ill. 135; DABBS v. DABBS (1954) 2 Ill. App. (2) 43; LARSON v. FURNAS et al., Gen. No. 10790, a recent case in this Court, not yet reported. Such matters of alleged fact as are presented by the motion and affidavit, to the extent they might be material, were all of such a nature as must have been known to the defendant at the time of the hearing and long prior thereto, and no satisfactory excuse is shown why they were not testified to by the defendant at the hearing.

Under the circumstances here, the conclusion of the trial court, in effect, that no "good cause" had been shown by affidavit for vacating and setting aside the decree and that the motion should be denied was not an abuse or improper exercise of its sound legal discretion.

We have read all of the cases cited by the defendant: TRENCHARD v. TRENCHARD (1910) 245 Ill. 313; YOUNG v. YOUNG (1889) 130 Ill. 250; SHOREDICHE v. SHOREDICHE (1885) 115 Ill.

102; COMPTON v. COMPTON (1917) 204 Ill. App. 629; SYKES v. SYKES (1949) 404 Ill. 152; SKORONSKI v. SKORONSKI (1946) 395 Ill. 301; PODGIORNIK v. PODGIORNIK (1945) 392 Ill. 124; FARNHAM v. FARNHAM (1874) 73 Ill. 497; MOORE v. MOORE (1935) 362 Ill. 177; WHITLOCK v. WHITLOCK (1915) 268 Ill. 218; JACKSON v. JACKSON (1938) 294 Ill. App. 552; and OLLMAN v. OLLMAN (1947) 396 Ill. 176. They do not militate against the views we have expressed, and are not here applicable. Some, in fact, - SYKES v. SYKES, supra, and FARNHAM v. FARNHAM, supra, for example, - might have been cited in support of the decree here.

The decree granting the divorce and other relief, and the order denying the motion to vacate the decree should be and are affirmed.

AFFIRMED.

In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1954

5 I.A.^{2d} 481RALPH LAMBRECHT and
LOUISE LAMBRECHT,

Plaintiffs-Appellees,

vs.

ILLINOIS LIQUOR CONTROL COMMISSION,
CITY OF ROCK ISLAND, a Municipal
Corporation, and CARL F. BAUER, Mayor
and Local Liquor Commissioner, of the
City of Rock Island, Illinois,

Defendants-Appellants.

Appeal from the
Circuit Court of
Rock Island County,
Illinois.

Dove, J.

Carl F. Bauer, the Mayor and local Liquor Commissioner of the City of Rock Island, Illinois, revoked the liquor license of the plaintiffs, Ralph and Louise Lambrecht. This order upon, appeal by the plaintiffs, was sustained, after a hearing by the Illinois Liquor Control Commission. The plaintiffs then on October 24, 1953, filed their complaint to review that decision under the provisions of the Administrative Review Act in the Circuit Court of Rock Island County, and that court reversed the decision and order of the Commission and ordered the license of the plaintiffs restored. The defendants, the City of Rock Island and the Mayor, Carl F. Bauer, bring the record by appeal to this court for a further review.

Counsel for appellants contend that the record shows the circuit court, in reversing the decision of the Commission, violated the rules of administrative review, committed error in

Abstracts of papers presented at the Annual Meeting of the American Statistical Association, held at the University of California, San Diego, December 12-15, 1971.

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finding there was no substantial evidence in the record to sustain the decision of the Commission, and erroneously applied the law with respect to the power of the mayor to revoke the license of the plaintiffs under the statutes of the State of Illinois and the ordinances of the City of Rock Island. Counsel for Appellees insist that the record discloses that the Commission considered improper evidence, misapplied the law, and rendered a decision without any substantial evidence in the record to support it.

A proper consideration of this appeal requires a review of the evidence found in this record and a reference to the applicable statutes and pertinent ordinances of the City of Rock Island. Section 1, Article 1, of the Liquor Control Act (Ill. Rev. Stat. 1951, Chap. 43, pars., 94-195,) provides: "This Act shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors." Section 1 of Article IV (par. 110) of the Act provides: "In every city * * * * * the city council shall have the power by general ordinance or resolution to establish such further regulations and restrictions upon the issuance of and operation under local ~~local~~ licenses not inconsistent with law as the public good and convenience may require *****." Section 1 of Article VI (par. 119) of the Act provides: "A license shall be purely a personal privilege, good for not to exceed one year after issuance, except a non-beverage user's license, unless sooner revoked as in this Act provided, and shall not constitute property * * * *. Any licensee may renew his license at the expiration thereof, provided he is then qualified to receive a license and the premises

for which such renewal license is sought are suitable for such purpose * * * * * ." Section 12 of Article VI (par. 131) of the Act provides: "No licensee nor any officer, associate, member, representative, agent or employee of such licensee shall sell, give or deliver alcoholic liquor to any minor, or to any intoxicated person or to any person known by him to be an habitual drunkard, spendthrift * * * * * ." Section 5 of Article VII (par. 149) of the Act provides: "The local commission may revoke any license issued by it if it determines that the licensee has violated any of the provisions of this Act or of any valid ordinance or resolution enacted by the particular city council * * * * * ." Section 15 of Article IX (par. 180) of the Act reads: "In all prosecutions under this Article by indictment or otherwise, it shall not be necessary * * * * * to show the knowledge of the principal to convict for the acts of any agent or servant * * * * * ." Section 3 of Article X (par. 185) of the Act provides: "Every act or omission of whatsoever nature constituting a violation of any of the provisions of this Act, by any officer, director, manager or other agent or employee of any licensee, if said act is committed or omission is made with the authorization, knowledge or approval of the licensee, shall be deemed and held to be the act of such employer or licensee, and said employer or licensee shall be punishable in the same manner as if said act or omission had been done or omitted by him personally."

Chapter 35, Section 10, paragraph 2 (a) Revised Ordinances of the City of Rock Island, 1952, provides: "No minor shall be permitted in any licensed premises where the principal business is the sale of alcoholic liquor, with or without their parents. The parents will be held equally responsible with the licensee for the violation of this provision."

An examination of this record discloses that a liquor license was first issued to appellees on April 1, 1951 and under that license they operated a tavern known as "Dannons Place" located at ^{the} south-east corner of 24th street and Fourth Avenue in Rock Island. May 4, 1953, was the last time this license was renewed and on June 9, 1953, the mayor of the city, in his official capacity as Liquor Commissioner, revoked this license.

The mayor, from this investigation, and the Illinois Liquor Control Commission found from the evidence in this record that appellees sold liquor to intoxicated persons and permitted minors to remain in their tavern. The trial court found there was no competent evidence in the record to sustain those findings. We will, therefore, set forth quite fully the evidence found in this record.

Carl F. Bauer testified that he took office as Mayor of Rock Island on May 4, 1953; that complaints about conditions that existed at appellees' tavern came to him and he examined the Police records which disclosed that during the first four days of June 1953 there were 15 arrests made at this tavern, for various causes, including selling liquor to minors; that more than forty arrests had been made during 1953 up to June 1st and that in the year 1952 ninety arrests had been made; that the chief of police prepared a report as to conditions at this tavern and that he, as Mayor, consulted with the Chief of police and on June 4th he revoked the license of appellees. Upon cross examination this witness testified that he had no personal knowledge whether appellees had sold liquor to minors but based his action upon what the police records disclosed and that the records did not disclose that appellee, Ralph Lambrecht, had appealed his conviction for selling liquor to

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China. This has been due to a variety of factors, including the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country.

minors at the time his license was revoked.

Robert D. Harrison testified that he was 20 years of age at the time of the hearing before the Commission on August 10, 1953; that on June 1, 1953, he was at Gannon's Tavern, going there for the purpose of seeing his friend, Bill Young; and while he was there he did not buy any liquor or beer but somebody (a customer) gave him a bottle of beer; that he had never been there before, didn't know the customer's name, had never seen him before, but does know that this stranger bought a round of drinks for all who were there including this witness.

Robert Neyens testified that he was a patrolman employed by the City of Rock Island and that he and Max Jennings, a sergeant of police, were in Gannon's Tavern on June 1, 1953, and they observed Robert Harrison and J. E. Cummins, both minors, drinking beer and they were arrested; that on May 6, 1953, this witness and Jennings arrested Robert Crow, a minor, "at the back" of this tavern, and that on May 1, 1953 these police officers arrested Wm. F. Fox, a minor, who was in appellees' tavern. Max Jennings testified on behalf of appellees that he did not recall these arrests but did not contradict Neyens testimony.

Dale E. Cummings testified that at the time of the hearing he was 18 years of age; that on June 1, 1953, he was in appellees' tavern for about ^{one} ~~one~~ hour; that no one inquired concerning his age; that someone bought a round of beer and handed him one; that a couple of weeks before he had been in Gannon's Tavern and tried to buy beer but Ralph Lambrecht would not serve him.

Clifford H. Anderson testified that he was 65 years of age, a special policeman, as well as a acetylene burner,

welder and dynamiter; that he worked for appellees in their tavern in October, November, and December, 1952, from ten o'clock in the evening until three o'clock the following morning; that he often observed drunken persons in the tavern; that Darlene Straus was frequently there in a drunken, dazed condition and would sit at the bar and order drinks when she could hardly hold her head up. This witness further testified that upon one occasion he called the police wagon and assisted in placing an intoxicated man in the wagon and this person was taken to jail; that on Hallowe'en evening 1952, fifteen people engaged in a fight in the tavern; that on another occasion witness saw Charles Myers take a wrist watch off of John Higgins, who was drunk, "completely out" as the witness expressed it, and Meyers was placed under arrest. This witness further testified: "I never saw licensee or any of his agents refuse a drink to a person on the grounds they were too intoxicated. I never saw them refuse. It didn't make any difference what condition they were in." On cross-examination this witness testified that part of his duties while employed by appellees was to break up fights which occurred in the tavern and to see that people behaved themselves and to keep the place free of minors and that appellee Ralph Lambrecht told him to throw the drunks out when they got in the booths.

Madeline Johnson, a woman sergeant of police testified that she was well acquainted with Darlene Straus; that she knows she uses intoxicants freely; that between January and June 8, 1952, she visited Gannon's Tavern ten or twelve times a month; that she saw Darlene there frequently and on some occasions she was drunk.

The police records were produced upon the hearing showing the number of arrests made in and about Gannon's Tavern during 1952 and from January 1953 to the time the license was revoked.

The record also shows the convictions of Robert D. Harrison and J. D. Cummins, minors, charged with being in a tavern on June 1, 1953, in violation of the ordinances of the City of Rock Island and also the conviction of Marion F. Crow, a minor, who plead guilty to the same offense of being in a tavern on May 6, 1953; also the record of the arrest of Wm. F. Fox, on the charge of being a minor in a tavern, in violation of this same ordinance; also the conviction of appellee, Ralph Lambrecht, on the charge of violating the ordinances of the City of Rock Island prohibiting the sale of liquor to a minor and the payment by him of a fine of \$100.00 and costs.

On behalf of appellees, John Kehoe testified that he worked for appellees on Friday and Saturday nights from 9:00 o'clock p.m. to 3:00 o'clock a.m. and on Sunday's from 4:00 o'clock to ten o'clock p.m.; that when in doubt as to anyone's age, he had instructions to check their identification cards and not to serve anyone who was "too" intoxicated and not to permit anyone to sleep at the tables. This witness further testified that Dallas Coffman, a minor, had bought a glass of beer on February 27th, just before the police officers arrived and then he was arrested; that Jimmie Leach was in the tavern on May 3, 1953; that Leach was a minor and the barkeeper called the police and he was arrested. This witness further testified that upon one occasion six people came in while he was working there, among them a young girl and witness put all of them out because they could not prove their ages.

George C. Lambrecht testified that he was a brother of appellee, Ralph Lambrecht, and that he had been in his brother's employment as a bartender for a year and a half and that his hours were from six in the evening until three the following

morning; that he frequently refused to serve persons who were drunk or disorderly and that his brother had instructed him three or four times each week while he was employed by him to be careful about selling to minors and to shut off persons who appeared to be intoxicated.

Appellee, Ralph Lambrecht, testified in his own behalf that he was 28 years of age, ~~xxxxx~~^{served} in the Naval Service of the United States for three years; that his tavern is a frame building; surrounded by rooming houses, factories and many taverns and liquor stores, and that there are two different Negro sections within two blocks of his place of business; that the bank of the Mississippi River is two blocks away "which is quite a hang out for winos, hoboes and people unemployed;" that he bought the tavern from Spike Gannon on May 1, 1951, at which time it was a rough establishment with a "bad character"; that it had a rough name for years, but he had eliminated as many as 50 winos and trouble ^{makers}~~makers~~ and that the general attitude of the place is much better than it was altho the police records make it look bad. This witness then continued; "With respect to the arrest records, I requested many of the arrests. Business was very heavy and most of the customers worked in the shops around there. The hoboes and winos was a small percentage of the people I had; the rest came from commercial buildings and construction groups. We did not allow gambling. We refused to serve persons when it looked like they had enough. After we cut them off, people would slip out back of the building and drink out of bottles. I took many bottles of wine away from people and destroyed them. I hired Clifford Anderson after I conferred with Mayor McKay and Larry Jones. Mr. Anderson's services were not satisfactory. He took things in his own hands and when he arrested someone, if I asked him why he was arrested, he would

tell me it was none of my business. People complained ^{that} Mr. Anderson was interfering with them and their girl friends and taking their girls home. If we thought we should cut off a man, Mr. Anderson grabbed him by the collar and started beating on the man without any reason, Mr. Anderson would not cooperate or explain to me and he would take girls away from the customers after closing hours. Sometimes he purchased liquor and took them home after that. Many times I saw arrests and one evening he was arresting someone because there was a fight starting and I saw no reason for giving the people the rough treatment. I asked him if he would not start breaking them apart. He told me to mind my own business. I said; 'Tonight you are though Clifford.' He said; 'I am going to quit right now. I will get you arrested and get your license revoked.'

This witness further testified that he always gave his bartenders instructions to keep minors out and not serve runks and to get rid of loud and boisterous people and if necessary to call the law. He denied that he ever expressed to his employees a willingness to serve just anyone; that he cooperated at all times with the police; that his beer prices were cheaper by a nickel a bottle and he served a larger glass of beer to the working man than any of his competitors and expressed his belief that the complaints made to Mayor Bauer concerning the operation of his tavern were due to the jealousy of his competitors because of the volume of business he did. His explanation of why he plead guilty to selling liquor to Harrison and Cummins follows: "I was called at the tavern to come to the City Hall that there was a charge against me. I was not aware at the time they had two minors booked. Jones (Lawrence O. Jones, assistant Chief of Police) called me into his office and said he was to book me

for selling liquor to minors. A warrant was read to me in Police Magistrate's McBride's court. He asked me if I was guilty. He said I was selling liquor to minors and I did not get a chance to see the minors. I asked if I could continue it. He said, 'Continue it, what for? The minor's parents are in Missouri, you sold liquor to minors, why squirm about it?' I wanted to avoid argument and I didn't know how the liquor was sold or what the circumstances were, so I said, 'I guess I am guilty', and signed it. Appeal was taken from that conviction later. I was not represented by counsel at that time."

This appellee further testified that he was not present at 1:00 o'clock a.m. June 1st. when any liquor was sold to Cummins or Harrison but that he had previously seen Cummins a couple of weeks before June 1st and at that time asked him for his identification card which had 'Young' upon it; that he doubted his age and told him to leave; that he was not present on May 6th when Marion Crow was arrested or on May 1st when William Fox was arrested. As to Darlene Straus this witness testified that she staggered about the streets from tavern to tavern; that he called the police ~~two~~^{three} or four times but she continued to come back to his place. On cross examination Mr. Lambrecht testified that Darlene sometimes came to his tavern sober ^{that} on many occasions ^{she} and obtained drinks but when she came ^{and} ~~she~~ was drunk ~~and~~ he would usually put her out. "When she was sober," said this witness, "we would give her a few drinks, then she would go to another tavern and then come back and it usually ended up by a friend getting her a bottle and she would be staggering around the street. When I was present I never allowed her to drink. If she had enough, I put her out. I put her out 25 times myself. She has been barred. I don't think she has been in my place drinking for over six months."

[illegible]

There was evidence tending to show that appellees cooperated with the police department in ~~xxxxxxx~~ ^{apprehending} wanted persons and in quelling disturbances in the neighborhood of their tavern and did frequently call the police. Earl R. Maynard testified that he was Chief of Detectives of the City and that upon one occasion appellee, Ralph Lambrecht, expressed concern over the number of arrests being made at his tavern.

The foregoing is a fair resume of the evidence found in this record. A consideration of it by the Commission, who saw and heard the witnesses testify, convinced them that the revocation of appellees' license by the Mayor of Rock Island as Local Liquor Commission was justified, and in so concluding the majority of the commission said: "The Commission's decision in this case is based solely on the established facts that already intoxicated men and women have repeatedly been served liquor in this tavern, and that minors have been permitted to frequent the place and to drink liquor there. These facts have been established by the ^{un}contradicted testimony of competent witnesses and by a record of repeated arrests and convictions. The Illinois Liquor Control Act and the Rock Island ordinances make it ^aduty of licensees to prevent these things on their premises. The failure to meet this obligation required a revocation of this license. Full consideration has been given the long list of defenses assembled in defense of these licensees; that they were not present when these things happened; that their place of business is often so crowded that they cannot know everything that goes on there; that they have often called the police; that their personal character, reputation, records and conditions warrant sympathetic consideration. These excuses are both weak and irrelevant. The hard facts are that these

There are various theories as to the origin of the word

apprehending
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and it is not possible to say which is the correct one.

It is, however, generally agreed that the word is derived from the Latin

apprehendere, which means to take, to seize, to grasp.

The word is also used in the sense of to understand, to comprehend.

It is, therefore, a very important word in the English language.

The word is also used in the sense of to apprehend, to arrest.

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premises have been operated in a manner which violates the law. This violation has been repeated and extreme. It requires the revocation of this license."

The Administrative Review Act provides that these findings and conclusions of the Liquor Control Commission shall be held to be prima facie true and correct by the court which reviews the record of the Commission. (Ill. Rev. Stat. chap. 110, par. 274.) The purpose of the review by the circuit court was to determine whether the findings and conclusions of the Commission are supported by the evidence, and only if they are against the manifest weight of the evidence can they be set aside. (Logan v. Civil Service Commission, 3 Ill. 2d. 81, 86, 87.) In Harrison v. Civil Service Commission, 1 Ill. 2d. 137, after quoting paragraph 274 of the Administrative Review Act, the court said (p. 145): "These provisions have been construed to mean that while the courts do not have the right to reweigh the evidence adduced before the administrative agency, they do have the power and duty to consider the record to determine if the findings and orders of the administrative agency are against the manifest weight of the evidence." (citing cases). The court then went on to say (P. 146): "The court is not authorized to weight the evidence, nor to make its own independent determination of the facts..... the type of judicial review authorized under the Administrative Review Act, whereby the court must regard the findings of the agency as prima facie correct and is permitted to set them aside only if they are contrary to the manifest weight of the evidence, has traditionally been regarded as a judicial function, comparable to the issue at law as to whether there is competent evidence to support a judgment of a lower court..... This court is therefore obliged, under the Administrative Review Act to examine the record and determine whether the findings of the

Commission are supported by any evidence."

The trial court realized that it was not authorized to put itself in place of the Commission and determine independently the issues presented or substitute its judgment for that of the Commission but was limited to a determination of whether the findings and decision of the Commission had a substantial foundation in the evidence. After reviewing the record, the court concluded there was no competent evidence in the record of violations of the Dram Shop Act or the ordinances of the City of Rock~~land~~^{ISLAND} and held that the Commission acted arbitrarily in affirming the order revoking appellees' liquor license.

There is , in our opinion, sufficient evidence found in this record to sustain the Commission's findings that appellees sold liquor to intoxicated persons. Clifford H. Anderson testified that sales of liquor were so made to Darlene Straus. Anderson further testified that appellees never refused a drink to anyone no matter how intoxicated he or she may have been. The trial court characterized Anderson's testimony as general, evasive, contradictory, internally inconsistent, inherently improbable, motivated by a desire to get even, and not entitled to credence.

The trial court also found that by issuing the license to appellees on May 4, 1952, the mayor found that the licensees were qualified to receive the license and that the premises were then suitable

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to be licensed for the operation of a tavern business and as a matter of law the Mayor was estopped thereafter to deny that appellees were qualified to be licensed and estopped to revoke their license because of anything which occurred prior to the time their license was renewed on May 4, 1952. We do not agree, for it is inconsistent with Section 5 of Article VII (paragraph 149) of the Act, which provides: "The local Commission may revoke any license issued by it if it determines the licensee has violated any provisions of the Act." Section 1 of Article I of the Act (paragraph 94) provides the Act shall be liberally construed to the end that the health, safety and welfare of the People of the State shall be protected. Further, there is no showing that the mayor, had any knowledge of these violations at the time he renewed plaintiffs' license, and the knowledge of the police officers of the City of Rock Island as to these violations could not be imputed to him. (Rippinger v. Niederst, 317 Ill. 264, 275). Certainly, the Commission, in a trial de novo, is not estopped from considering evidence of the violation of the provisions of the Act and the City ordinances.

Appellees question the validity of the city ordinance prohibiting minors upon premises where alcoholic liquor is being sold. In City of Lewistown v. Pitch, 130 Ill. App. 170, it was held that a city may within its police power lawfully pass an ordinance prohibiting minors from frequenting or loitering in dram shops or from procuring intoxicating liquors therein. The court said in that case that this rule was for the purpose of preventing the debauchment of youth. It is to be noted that Section 1 of Article IV of the Liquor Control Act (par. 110 of the Act) quoted hereinabove provides in part: "In every city * * * * the city council * * * * shall have the power by general

ordinance or resolution * * * to establish such further regulations and restrictions upon the issuance of and operation under local licenses not inconsistent with law as the public good and convenience may require * * * * * ." In *Hornstein v. Liquor Control Commission*, 412 Ill. 365, at page 370, the court said, quoting from *Gibbons v. Cannavan*, 393 Ill. 374; "In the exercise of the police power, the legislature may enact laws for the purpose of protecting the health, morals and safety of the people, either by prohibiting traffic in ~~intoxicating~~ ^{intoxicating} liquors or licensing it, or permitting it under any conditions which, in their judgment, they may approve." The court also said in that same case, at page 370, "That the business of selling intoxicating liquor is attendant with danger to the community and is a recognized subject for regulation by the police power of the state." The court there further said, "There is no inherent right to carry it on, and it may be entirely prohibited." It is our opinion that the city ordinance prohibiting minors on premises where alcoholic liquor is sold is a valid exercise of the police power possessed by a municipality in the exercise of its attempt to protect the general health, welfare and morals of its citizens, pursuant to Section 1 of Article IV of the Liquor Control Act.

The circuit court found that the plaintiffs had no knowledge that intoxicated persons were being served in their tavern, and, therefore, they had a defense to the revocation of their license on this ground. The court also found that if any minors frequented the tavern they did so without the knowledge, authority or consent of the plaintiffs. The Commission found that the plaintiffs did have knowledge that intoxicated persons were served on the premises, and did have knowledge that minors frequented the same. In reaching the conclusion that it did, the circuit court had to weigh the evidence, which, under the rule of law applicable to this type of proceeding, as above pointed out, it was not authorized to do. *It must be remembered that an order of an administrative board is binding upon the circuit court unless manifestly against the weight of the evidence.* (*School District v. School Trustees*, 4 Ill. 2d 533, 541.)

Section 3 of Article X of the Liquor Control Act (par. 185 of the Act), heretofore set forth, provides that the violations of any of the provisions of the Act by an employee or agent of the licensee must be done with his authority, knowledge or approval. Lack of such knowledge, authority or approval would, therefore, be a defense available to the plaintiffs in this proceeding to revoke their license, but the Commission, in arriving at its conclusion, found the defense was not proven, and its finding is in accord with the evidence, found in the record. There is abundant evidence in the record to show this tavern was a notorious place for fights, brawls, drunkenness and a gathering place for undesirable patrons. It is inconceivable that under such circumstances the plaintiffs did not have knowledge of what went on in their tavern, since plaintiff, Ralph Lambracht, personally worked there nearly every evening, and he and his wife lived above the tavern. It is interesting to note, in this connection, that when the legislature amended paragraph 185 of the Liquor Control Act in 1953, it omitted the requirement that the act or omission had to be made with the authorization, knowledge or approval of the licensee.

In our opinion there is competent evidence in the record from which the Commission was justified in finding that appellees permitted minors to be in their tavern thereby violating the provisions of the city ordinance. Four minors were arrested for being there and three plead guilty to the charge. Furthermore one of appellees was arrested for selling liquor to minors and plead guilty to the charge. The record shows he paid the fine imposed by the magistrate upon the plea of guilty but after his license was revoked he appealed.

The judgment of the circuit court is, therefore, reversed, and the cause is remanded to the circuit court with directions to enter an order affirming the order of the Illinois Liquor Control Commission.

Wolfe P. J. Concurs

Crow J. Tarkenton/jwt.

Reversed and remanded
with directions.

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SECOND DISTRICT

had completed his professional training and was on the staff of the said State Hospital located at Worcester, Massachusetts. In 1934, Dr. Rheingold came to Chicago and engaged in practicing neurology and psychiatry. Mrs. Rheingold remained in the East with her parents while he was establishing his practice in Chicago, and she, with her son, Paul David Rheingold, joined Dr. Rheingold there in 1935, where he continued his practice until 1943, when he entered the Naval Service of the United States and continued in that service until he was discharged in February, 1946.

In the summer of 1945, while her husband was in the naval service, Mrs. Rheingold and the two children came, with the consent of her husband, to Rockford, and in December of that year, she became assistant professor of psychology at Rockford College and taught there until she resigned. In 1951 she wished to enroll at the University of Wisconsin in order to obtain a Doctor of Philosophy degree, but her husband did not approve. Notwithstanding his disapproval, she felt it was necessary for her to have this degree if she continued with her work at Rockford College, and in the latter part of January, 1953, she resigned her assistant professorship there. Her testimony on this point, as abstracted, is as follows: "When I resigned, I resigned with the intention of pursuing the course of study at the University of Chicago. The first time the Doctor knew about it was when I told him I resigned for that purpose. This occurred during a period during which there was little or no conversation between us. The Doctor expressed his displeasure and disapproval. We did not have an argument about it at that time. For the most part he remained silent after expressing his views concerning it. He didn't say very much about it. I gathered more from how he felt than what he said. His reaction was one of lack of

interest. I knew how he felt about it because he had already told me. I first enrolled in a course on April 1, 1953. Prior to that, in March, I had gone to Chicago to plan for my future at the University. This was in March, 1953."

In 1951, when appellee told appellant ~~xxxx~~ that she wanted to go to the University of Wisconsin in order to obtain ~~her~~ Ph. D. degree, appellant told her she was in her middle 40's and was then the head of the department of psychology at Rockford College and that he couldn't see the point in her leaving home for two years, and inquired what they were going to do with Arnold, their youngest son, then ten years of age. Appellee suggested that she would take Arnold with her. To this appellant objected, and his wife then asked him if he thought Arnold was too young for her to leave, and he replied in the affirmative and nothing further was said about her pursuing her studies for this degree until February or March, 1953, when appellee told appellant she had resigned her assistant professorship at Rockford College and was going to Chicago to study.

Arnold, the youngest son, became thirteen years of age on October 6, 1953, and was attending Roosevelt Junior High School in Rockford. Sometime prior to this date Arnold was apprehended by the postal authorities for sending erotic letters through the mail, and appellant diagnosed his problem as a mental complex developed by Arnold toward his mother and, after consulting other psychiatrists, his father decided he should be separated from his mother. The nature and character of Arnold's trouble need not be mentioned further, but his parents realized

that his trouble was of long standing and quite serious, and they were very much concerned about him and his future. They discussed it among themselves to some extent, but appellant testified: "Surprising as it may seem, here we are, a husband, a psychiatrist, and a wife, a psychologist, and we are almost never able to sit down and talk quietly about our children." Appellee's testimony is: "During 1953 a problem developed in our family concerning Arnold, our youngest son. I wouldn't say that Dr. Rheingold and I discussed it but he gave his diagnosis and his decision as to how he would handle it. He gave Arnold a set of rules that he would have to obey. I had some opinion on the subject. The Doctor felt the boy was suffering from incurable problems. He made a psychiatric diagnosis which he said could only be helped by institutionalization. It was my feeling that the boy should be seen by a competent child psychiatrist and we follow his recommendations. There was some difference of opinion between me and Dr. Rheingold concerning the best method of handling the problem. I never questioned my husband's competence but I would say no psychiatrist is competent to diagnose or treat his own family."

At the time Arnold was apprehended by the authorities, which was about October 1, 1953, appellee had already enrolled in the University of Chicago for her doctor's degree and was in Chicago attending school five days each week, leaving her home in Rockford on Monday and returning late Friday evening or early Saturday morning. According to appellant, Arnold did very well while his mother was away but that "everything I accomplished during the five days she was away was 'broken down' over the week

end while she was in the house." On Saturday, October 17, 1953, or Sunday, October 18, 1953, appellant told his wife that they had to do something about Arnold, inasmuch as he had promised the authorities that Arnold would be sent to a boarding school. He further told appellee that he thought he could help Arnold if given a chance and submitted to her two plans: first, if she continued to return home from Chicago each week end, he would send Arnold to a boarding school; second, if appellee would consent to remain in Chicago over the week end and not return to Rockford, Arnold would remain at home with his father and continue his schooling at Roosevelt Junior High School and appellant would see whether he could correct Arnold's problems. Appellant stated that upon this occasion he told his wife that he realized that it was a hard decision for her to make, that he wished "it never would have come to this," but for her to think it over. The following day (Sunday) he inquired of her whether she had reached a decision, and she replied: "Yes, I will leave." Appellant further testified, and it was not denied that he then told his wife he would provide for her and make it possible for her to get her Ph.D. degree.

Appellee's version as to what occurred the day or two just prior to the time she left on October 19, 1953, follows: "In October, Dr. Rheingold asked me to come in and in the presence of Arnold told me in substance that he felt it would be necessary to send Arnold away to school if I would not leave home. That if I continued to come home on week ends, in his opinion, it would be necessary to send Arnold to school. He told me that because of the fact that Arnold was enrolled at Roosevelt Junior

High School and in his studies in the early part of the fall term, if I did not come back home on week ends, he (Arnold) could then, in the Doctor's opinion, continue his studies at Roosevelt and not be sent away to school. The alternative was that Arnold go to a particular school at this time if I continued to come home. It was not a school I would have suggested my son to go to. It was not the Wood's school to which I objected very strenuously. I discussed the merits of the proposal with Dr. Rheingold. I didn't give a definite answer. I could hardly say 'I accept and am leaving.' I didn't make a statement either way. I did not give an answer. I was weeping and could hardly talk. My silence was taken as assent. I did not agree not to come home but I did not come home and Arnold continued at Roosevelt Junior High School. After October 19th I did return to my studies in Chicago and I did not return the following week end. The entire problem that took place between me and the Doctor on the 18th and 19th was one that he felt that the problem called for a separation of Arnold and myself. That is what he said."

According to the testimony of both parties, their marital relations as husband and wife terminated in October, 1951. Appellee testified: "I do not know why Dr. Rheingold and myself ceased having marital relations at that time. I believe the reason was a certain reluctance on my part and a certain degree of annoyance. I might also say that this was the first time it happened in our married life, that is why I say it is not an adequate reason. This incident was in early October, it was about two, possibly three weeks after my son Paul David left for College. Prior to October, 1951, I had never declined to

have sexual relations with Dr. Rheingold at his request. I did not at any time prior to October, 1951, either jokingly or otherwise criticize Dr. Rheingold in the manner in which the sexual act was performed. I did at one time make a comment to Dr. Rheingold concerning writing a book about husband and wife relations. This refers to the incident about which we are speaking early in October which marked the cessation of our marital relations. At that time I made a statement which was that some day I would like to write a book for husbands on how they should treat their wives in relation to the sexual act."

Appellant testified: "During the twenty years or so of our marriage in which we carried on a sexual relationship I have been subjected to a good deal of humiliation, through rebuff and belittlement. On many occasions I was not only dismissed but dismissed in a way to cause me a good deal of pain, all I could do is go to bed and turn my face to the wall. She is arrogant as a woman. She may accept me or dismiss me as she pleases. She may comment upon my performance. Toward the end before the sexual intercourse ended she became querulous. I couldn't touch her without her saying, 'Let me alone.' Finally, one night she got out of bed and in a tone of utter contempt said, 'I'll write you a book teaching you how to make love.' I told her then that I'd never make love to her again and except on one occasion, I haven't. Prior to the 'I'll write you a book episode' I many times requested or suggested sexual intercourse at which time I was rejected or turned down. Prior to the last occasion, which I have testified to, I have never refused

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sexual intercourse but have always initiated it. In the early part of 1952 I left the bedroom and took up quarters in another part of the house for sleeping purposes. After the episode in 1951 there was an interval of some months in which we discussed the marital relations and continued sharing the same room, twin beds. It was some months later I moved out of the master bedroom and took up residence in the guest room. Something happened which made me feel my health was in danger. It was on a Saturday evening when I came home at eight or eight-thirty, very fatigued, and my nerves were on edge. I needed about half an hour or so of quiet and peace. It was at these times Harriet wanted to talk to me, to get under my skin. On this occasion I was unusually tired, I was having my dinner in the kitchen and she had something on the stove and told me to turn it off at nine o'clock and I said I would. She turned on the little timer and the clicking of that timer was like blows to my head. I said, 'You know it isn't necessary, I will turn it off on time.' There was a tone of irritation in my voice. The door was directly behind my back. She went out and slammed the door with such fierceness that things leaped up from the table and fell on the counter. I was paralyzed. My heart stopped for some time, my breath stopped. I thought I had a coronary attack. For days my system was disorganized. I was awake all night trembling, breathless, sweat pouring out of my forehead. I have worked with enough men in the office with coronary to know I was in danger. It was after that that I went to the guest bedroom."

The parties were the only witnesses, and we have detailed a considerable portion of their testimony. The applicable statute under which this proceeding was instituted provides

that married women who, without their fault, live separate and apart from their husbands may have their remedy in equity against their husbands for a reasonable support and maintenance while they so live separate and apart. (Ill. Rev. Stat. 1953, chap. 68, par. 22).

There are eight charges contained in appellee's verified complaint: (1) For several months prior to filing the complaint, appellant engaged in a course of irrational, inhuman, and cruel conduct with reference to both of his minor children. (2) For two years preceding October 19, 1953, appellant engaged in a like course of treatment toward the plaintiff. (3) Appellant made decisions relating to the care and education of the children without consulting their mother. (4) Appellant threatened to place Arnold in a school outside the State of Illinois, which would be prejudicial to Arnold's proper growth and development. (5) Appellant refused to speak to plaintiff except when required to do so. (6) Appellant for six months last past provided plaintiff with insufficient funds for her support. (7) Appellant terminated marital relationships with the plaintiff for more than a year before they separated and has never resumed them. (8) Appellant on October 17, 1953, ordered the plaintiff to leave their home and threatened action detrimental to Arnold unless plaintiff complied. Following the recitation of these charges, plaintiff averred that because thereof she was compelled to leave the defendant on or about October 19, 1953, and has since that time lived separate and apart from the defendant. The answer of the defendant denied these charges.

There is no evidence in this record to sustain the charge that appellant engaged in a course of irrational, inhuman,

or cruel conduct against either of his children. Paul David, the older son, was almost twenty years of age at the time of the separation and was attending college, and there are but few references to him in the record. As to his conduct toward Arnold, there are two trivial incidents referred to by both parties: one about the purchase of a bed for Arnold by the mother and Arnold and charging it to appellant without previously apprising the father of this purchase; the other had to do with picking out a sleeping bag and other articles from a Sears catalog. Appellee characterized appellant's conduct as unreasonable because he insisted the bed was bought contrary to an agreement he and Arnold and the mother had previously made and appellant insisted its cost was to be charged to Arnold's account. Appellant insists that upon these occasions he was only firm and acted as an authoritative father should act while his wife was too lenient. All that either occasion amounted to was an exchange of opposing views by the parties hereto in connection with purchasing a bed, sleeping bag, and a few other articles for their twelve-year-old son.

Nor is there any evidence substantiating her charge that for two years prior to October 19, 1953, appellant engaged in a course of irrational, inhuman, and cruel conduct toward her. Plaintiff testified she and her husband did not engage in arguments and never quarrelled and at no time was any physical cruelty exerted on the part of either toward the other. She testified that shortly after their marriage her husband would "retire into himself and become silent" and that this continued throughout their married life. His testimony is that "silence is the thing I have had to contend with throughout the years." It is apparent

that for many years there was very little communication between the parties. Each pursued diligently his or her own work without much reference to the other or concern about what the other did, but there is nothing in this record which would justify the conclusion that appellant's conduct was irrational, inhuman, or cruel.

Appellant did decide that there was just one way to correct Arnold's trouble and that was to ^{temporarily} ~~reasonably~~ separate Arnold and his mother. To do this he suggested two courses: one, that she remain in Chicago pursuing her studies and not return home over the week end; the other was to place Arnold in a boarding school. The result, so far as appellee was concerned, was the same. She and her son would not be together over week ends. When this decision was arrived at by the father, he communicated with the mother. She said they had discussed Arnold's problem. She submitted no plan to correct it or suggested anything better. She testified she never questioned her husband's ability and competence, and, so far as the record discloses, her remaining in Chicago and the son continuing at home with his father and attending school in Rockford justified appellant's course of procedure. There is no evidence in this record that had Arnold been sent to a boarding school, either within or without this state, it would in any way have been "prejudicial to his proper growth and development" as she charged.

Counsel for appellee insists that the record discloses that appellant grew morose, sullen, and silent in 1951 and refused to share his bed or conversation with appellee and told her to get out of the home or he would institute divorce proceedings and that unless she did get out he would send their son to a school in the East which neither the father nor mother regarded

[illegible]

1. The first of these is the fact that the majority of the population of the United States is of European descent, and that the majority of the population of the United States is of European descent.

as desirable. There is no evidence that appellant was more uncommunicative during the two years immediately preceding their separation than he had been at any time following their marriage. Appellant may have refused to speak to appellee except when required to do so, but both parties insist that the other is uncommunicative, and they agree that when they did discuss Arnold's trouble, they were not in entire agreement. There is no evidence that appellee ever requested appellant to share his bed or conversation with her or that she ever objected to the conduct of appellant in first occupying a twin bed in their sleeping room or his subsequent withdrawal to the guest chamber. Appellee was never motivated to leave home on October 19, 1953, because of the silence of appellant or because appellant never occupied the same sleeping quarters with appellee. She left because she believed it was best for Arnold to remain at home with his father rather than go to a boarding school and because she wanted to pursue her studies at the University of Chicago and eventually obtain her doctor's degree.

Appellee, in January, 1953, resigned her assistant professorship in Rockford College for only one purpose and that was to leave Rockford and study for this degree. Her testimony is that in March of that year she was away from home six days and in Chicago conferring with her professors about her course of study. In April she was in Chicago one day a week. During the month of June she was in Chicago from Monday through Friday of every week. In July she was taking a course at the University of Chicago, and part of August was spent by her in Chicago doing

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people for many years. It is a fact which has been recognized by the government and the people for many years. It is a fact which has been recognized by the government and the people for many years.

research at the National Opinion Council. The first two weeks in September she spent in Rockford, but from that time on she was in Chicago except during week ends until October 19, 1953, at which time she permanently took up her residence there. She testified that the course she was taking required four or five years in school in the University, but because of her experience in teaching and the fact that she had her master's degree led her to hope she would be able to complete her research project within a year.

There is no substantial conflict in the evidence of the parties to this record so far as the essential facts which led to their separation on October 19, 1953, are concerned. Each is well educated and intelligent. Throughout their married lives each pursued his or her profession, and each was deeply engrossed in their respective activities. Neither apparently engaged the other in extensive conversation, and when they did their views were in conflict and their opinions seldom in agreement. They argued occasionally but never quarrelled. Neither ever exerted any physical violence toward the other, nor did either ever employ toward the other any intemperate, abusive, profane, or obscene language. They occupied a large, well-appointed house, enjoyed good health, and their material wants were amply provided for. Appellee was confident that it was necessary for her, if she continued teaching, to obtain her doctor's degree. Appellant disapproved. Without consultation with her husband and in opposition to his expressed wish, she proceeded to carry out her plans. During the eight months preceding their separation on October 19, 1953, she was frequently absent from their home, leaving her husband and their thirteen-year-old son sometimes with and at other times without a housekeeper. During

the three weeks immediately before the separation she was in Chicago attending school and only spent Saturdays and Sundays at home. At this time the older son was attending Oberlin College, and Arnold and appellant were home. Shortly prior to October 1, 1953, Arnold became involved in the trouble hereinbefore referred which gave both of his parents considerable anxiety. The father concluded it was best for Arnold to be separated from his mother. This could be accomplished in two ways: one, by placing Arnold in a boarding school; the other, by appellee remaining in Chicago Saturday and Sunday of each week. Appellee and appellant discussed the matter and, according to her own testimony, she chose to remain in Chicago and never returned. More than a month previous to this she had consulted an attorney in Chicago with reference to this proceeding, and on December 10, 1953, she filed the instant complaint.

Under the authorities, a wife who voluntarily and intentionally leaves the home provided by her husband in the absence of fault upon the part of the husband cannot maintain a proceeding of this character. What then is the fault of appellant which justified appellee in leaving her home? According to her complaint, appellant threatened to place her thirteen-year-old son in a boarding school. The evidence is that appellant told appellee that Arnold would be placed in a boarding school if she continued to come home over the week end. The complaint states that appellant ordered appellee to leave home. The evidence doesn't sustain that charge. The complaint charged that appellant threatened action detrimental to Arnold unless she did leave home. The evidence is that what appellant said to

appellee was that if she continued to return home over the week end, Arnold would go to a boarding school. There is no evidence that had Arnold gone to a boarding school it would have been detrimental to him. By remaining away from home, it follows that appellee concluded that to have Arnold remain at home with his father was preferable to placing him in a boarding school. The suggestion or plan of the father was acquiesced in by the mother and carried out, and the son remained at home with his father and continued in school in Rockford. The only fault of appellant in this connection is the plan which he submitted to his wife for the solution of Arnold's problem.

The circumstances of appellee leaving her home, as disclosed by the undisputed facts found in this record, preclude appellee from maintaining this suit. A separation by the consent of both parties is a bar to the wife's suit for separate maintenance. If appellant was at fault in proposing what he did with reference to the solution of Arnold's problem, certainly appellee was equally at fault in acquiescing in her husband's suggestion. Where the fault of the wife is equal to or greater than that of the husband and her conduct materially contributes to the separation, the wife cannot maintain a suit of this character. (Babbitt v. Babbitt, 69 Ill. 277; Houts v. Houts, 17 Ill. App. 439; Wahle v. Wahle, 71 Ill. 510; Thomas v. Thomas, 152 Ill. 577; Angelo v. Angelo, 81 Ill. 251) ~~Wahle v. Wahle, 71 Ill. App. 439~~ Under the statute, an allowance for separate maintenance can be made to the wife only in case the separation was without her fault. If she voluntarily consents to the separation, she is not without

fault within the meaning of the statute. (Vock v. Vock, 365 Ill. 432, 434.)

In Wahle v. Wahle, 71 Ill. 510, it is said that the statute does not contemplate that merely because of incompatibility of disposition or occasional exhibitions of passion or imprudence in speech, which may have been provoked by herself, the wife shall be justified in abandoning the home, with the view to compel her husband to maintain her elsewhere. The court then continued (p. 516): "To authorize a decree for ~~the~~ ^{the} separate maintenance of the wife, other than for ^{the} causes for which a divorce will be granted, it ought, at least, to be proved that there was reasonable danger of personal violence to her, or a persistent, unjustifiable course of conduct, on the part of her husband, which would necessarily render her miserable, if she continued to remain with him, and that the conduct of the husband was not, in any considerable degree, induced by her fault." Along the same lines are Hunter v. Hunter, 7 Ill. App. 253, Hellrung v. ~~Hel~~ Hellrung, 321 Ill. App. 333, and Decker v. Decker, 279 Ill. 300.

The record shows that the parties hereto were diligent in their work and successful in their respective lines of endeavor. Appellee was an excellent teacher and merited and received the approbation of the president of the college and others. Appellant enjoyed an excellent practice and had an income from his profession of at least \$25,000.00 per year and had substantial savings. The family had few meals together, and appellant seldom returned home until eight or eight-thirty o'clock in the evening and had his evening meal alone in the kitchen. Every week day was a busy one, and it was only on Sundays that the family were together. Appellee employed her evenings in study and reading, and for many years

1911, within the meaning of the statute. (Couch v. Noel, 381

Ill. 437, 1901.)

In *Smith v. Smith*, 70 Ill. 219, 18 2d 323, 1887, the

statute does not contain any words which would indicate an intention

that the obligation on the part of the husband to support his

wife is in effect, which may have been proved by the facts.

and will still be justified in maintaining the home, with the

view of support his wife and maintain her element. This

does not continue (C. 219): "The husband is bound to support his

wife and maintain her, and that the husband is bound to support his

wife and maintain her, and that the husband is bound to support his

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there had been very little conversation between them.

As stated in *Amberson v. Amberson*, 349 Ill. 249, 253, each marriage relation presents different problems and different personalities so that no definite rule of conduct can be laid down which would suit each particular case, but all of the authorities are to the effect that incompatibility of dispositions do not warrant a separation, and, while the parties hereto may be unable to live a satisfactory existence under the same roof, their status when they separated was not much different than it had been for many years. Appellant may be silent, taciturn, an unacceptable husband, and opinionated, but from the evidence found in this record, under the foregoing authorities, appellee is not entitled to a decree of separate maintenance.

The decree and supplemental decree appealed from will therefore be reversed.

Decree reversed.

there has been very little conversation between them.

As stated in Anderson v. Harper, 219 Ill. 199,

223, each marriage relation presents different conditions and

different responsibilities as well as different rights of support

and of inheritance which would vary with particular facts. The

law of the parties is not the same in all cases. The law of the

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Anderson v. Harper.

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Abstract

General No. 10782

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Agenda No. 18

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D., 1954

HELEN E. IND, as Administrator
of the Estate of Charles
Ind, Jr., Deceased,

Plaintiff-Appellant,

vs.

JOHN DAVIS and JACK GARTMAN,

Defendants-Appellees.

}
} Appeal from the
} Circuit Court of
} Winnebago County.
}

Per Curiam:

This action was brought by Helen E. Ind, administrator of the estate of Charles Ind, Jr., deceased, to recover damages from the defendants, John Davis and Jack Gartman, for the death of the said Charles Ind, Jr. The jury found each defendant not guilty, and motions by each for directed verdicts of not guilty at close of all the evidence and for a new trial were denied and judgments on verdicts entered.

The accident in question occurred on the night of October 10, 1952, at about the hour of 9:45 p.m. on Route 2 a few miles south of Rockford, Illinois. Said highway was comprised of two traffic lanes, one for north-bound traffic and the other for vehicles traveling south; the decedent was the superintendent

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of a construction company which was engaged in the widening of said highway by the placing of a cement strip on each shoulder. The record indicates on the night in question the deceased had parked his car on the easterly side of the highway facing north with the headlights and spotlight burning. On the shoulder of the west side of the road flares were burning and there were signs stating "Work in Progress," "Travel at your Own Risk," and "Road Under Construction." The defendant, John Davis, was driving north in a pickup truck and was towing a stake-body truck, and seated in the truck with him was Robert Burns. An employee, Donald Burns, was steering the truck being towed, and seated with him was Clarence Pippin, also an employee. Said stake truck was towed by means of a rope about eight feet long. The pickup truck had its headlights and tail light burning. There is not much dispute in the evidence as to lights also showing on the stake truck. The defendant, John Davis, saw a person leaning over some pot flares on the westerly side of Route 2 when the Davis trucks were about 500 feet from him and watched the individual straighten up and walk towards the center line of the highway about opposite the parked car. John Davis lessened the speed of his truck and watched the man stop just west of the center line of the highway, and he was about two feet from the left side of the front truck as it passed and in about the same relative position to the cab of the towed truck as it went by him.

It is alleged in the complaint, as grounds for recovery against John Davis, that the towed truck swung over to the left side of the road and struck the deceased and that it was traveling

at excessive speed and without lights. There is no evidence in the record that at the time of the alleged occurrence the said truck swerved to the left over the center line. The speed was around thirty miles per hour. Neither the defendant Davis nor the other in the pickup truck or those in the towed truck saw the deceased struck, and no one heard a thud or any noise to indicate an accident. The next day John Davis heard that someone had been hit near there and informed the sheriff's office that the night before he had seen a pedestrian on the road about the point the decedent was found. A few minutes after the Davis trucks passed the person, the defendant, Jack Gartman, sixteen years of age, was driving his car containing four other boys of about the same age in the southerly-bound traffic lane when it struck the body of Charles Ind, Jr., which was lying in the path of travel and about opposite the parked car or a few feet south of it. An examination of the Gartman car revealed that the evidence of the striking was confined to its understructure. A large pool of blood was found where Ind was lying when struck by the Gartman car, and also considerable blood was at the location where the body was found after having been dragged. The body was examined almost immediately and no sign of life was observed. Human blood was found on one of the stakes on the left side of the stake truck. An employee of John Davis, Clarence Pippin, testified that previously on the day of the accident he had a sore on his left ankle and, upon climbing onto the stake truck near the stake in question, he had struck the sore and that bleeding then and there had occurred. Analysis of the blood upon the stake disclosed it was of the same type as

that of Clarence Pippin. There is no evidence in the record as to the type of blood of Charles Ind, Jr. An examination of the body and the pools of blood in the south lane of traffic indicated that the deceased was alive at the time the Gartman car struck him, according to expert evidence in the record.

The plaintiff seeks to recover from the defendant, Jack Gartman, on the grounds that the said defendant in the exercise of due care should have seen the deceased lying in the path of travel; that he negligently drove by and along the warning signs at a speed greater than was reasonable and proper under the circumstances and that by reason thereof struck and dragged the prostrate Charles Ind, Jr., one hundred feet and caused his death. The said defendant was called as a witness by the plaintiff under Section 60 of the Civil Practice Act and testified that for a distance of about 200 feet previous to the accident he had been watching the Ind car parked on the easterly side of the highway; that only a moment before the deceased was struck did he observe an object on the highway and that he did not know it was a human body until after the accident. He further testified that he was driving about sixty-five miles per hour. Other witnesses testified the Gartman car was traveling from fifty to fifty-five miles an hour.

The plaintiff-appellant seeks a reversal of the judgments in favor of the defendants. The grounds urged for reversal are the giving of defendant's instruction number five, the improper argument of counsel for Jack Gartman, and that the verdicts are against the manifest weight of the evidence. Said instruction tendered by defendant Gartman and given by the court is as follows: "The Court instructs the jury that plaintiff's proof

[illegible]

cannot rest on guess and conjecture." The instruction complained of is an abstract legal proposition and as such has been repeatedly disapproved by the courts. Such an instruction singles out the plaintiff's case and tends to mislead the jury. The instruction should not have been given. (Burke v. Zwick, 299 Ill. App. 558; People v. Corbishly, 327 Ill. 312; Rogers v. Mason, 345 Ill. App. 560.)

Counsel for Gartman in his closing argument to the jury commented on certain accounts about the case contained in a Rockford newspaper. Further, he recited his experiences with a jury in another law suit and what the jury had found by its verdict and, also, what those jurors told counsel about the case after the trial. This character of argument was persisted in over the repeated objections of the plaintiff. We consider it to have been highly improper and of a character likely to prejudice the plaintiff. (Westbrook v. Chicago & Northwestern Ry. Co., 248 Ill. App. 446; Crutchfield v. Meyer, 414 Ill. 210.)

We believe that the errors aforesaid do not require a reversal of the judgment rendered in the trial court in favor of the defendant, John Davis. Our conclusion is that under the evidence the jury could not have properly arrived at any other verdict.

With the evidence close upon the essential question of liability as to the defendant Gartman, we are of the opinion that the giving of said instruction and the improper argument of counsel aforesaid constitute such error as to necessitate a reversal of the judgment against Gartman.

For the reasons assigned, the judgment in favor of John Davis is affirmed and the judgment in favor of Jack Gartman is reversed and the cause is remanded for a new trial as to him.

Judgment affirmed as to John Davis.①

Judgment reversed and cause remanded as to Jack Gartman.

It is not a simple matter to determine the exact date of the first appearance of the word "computer" in the English language. The word is found in the 14th century in the sense of "one who computes" or "one who calculates".

The word "computer" is derived from the Latin word "computare", which means "to calculate" or "to count".

The word "computer" is also found in the 16th century in the sense of "one who computes" or "one who calculates".

Abstract only

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Abstract

GEN. NO. 10787

AGENDA NO. 21

IN THE

5

I.A. 484

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1954

ANNA BERNIECE KING, Administrator
of the Estate of Lawrence J. King,
Deceased,

Appellee,

-vs-

WILLIAM HYMAN,

Appellant.

Appeal from the
Circuit Court
of
Winnebago County,
Illinois.

PER CURIAM:

This is an action by the plaintiff, ANNA B. KING, as administrator of the estate of Lawrence J. King, deceased, seeking to recover damages for the alleged wrongful death of the decedent, Lawrence J. King, allegedly occasioned by the negligence of the defendant, William Hyman, in the operation of the defendant's automobile. The complaint was originally in two counts, Count I charging, in substance, negligence, and Count II charging, in substance, wilful and wanton conduct by the defendant. The answer neither admits nor denies the several paragraphs of the complaint. No questions are raised on the pleadings. At the close of the plaintiff's evidence the plaintiff moved to dismiss Count II and that count was dismissed. At the close of the plaintiff's evidence the defendant made a motion for a directed verdict and that was denied. The record does not indicate

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Appeals

Vol. 10287

1.A. 84

IN THE

UNITED STATES

OF DISTRICTS

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| <p>Appeal from the
Circuit Court
of
Harrison County,
Alabama.</p> | <p>Plaintiff,
vs.
Defendant.</p> |
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THE COURT:

This is an action by the plaintiff, *John E. King*, as administrator of the estate of *Laurance T. King*, deceased, seeking to recover damages for the alleged wrongful death of the decedent, *Laurance T. King*, allegedly occasioned by the negligence of the defendant, *William Hyman*, in the operation of the defendant's automobile. The complaint was originally in two counts, Count I charging, in substance, negligence, and Count II charging, in substance, willful and malicious conduct by the defendant. The answer thereto admits the several paragraphs of the complaint. No issues are raised on the pleadings. At the close of the plaintiff's evidence the plaintiff moved to dismiss Count II and that count was dismissed. At the close of the plaintiff's evidence the defendant made a motion for a directed verdict and that was denied. The record does not indicate

that the defendant made a motion for a directed verdict at the close of all the evidence. No questions are now raised on the admission or exclusion of evidence. After the argument of the parties to the jury and after the instructions to the jury, the defendant moved, in writing, that there be submitted to the jury a certain written special interrogatory, the motion reciting that copies of the special interrogatory had been served on opposing counsel, and the special interrogatory requested being "Do you find from the evidence that the plaintiff's intestate could have avoided the accident and injury in question by exercising ordinary care and caution for his own safety just before and at the time and place of the happening thereof?" The Court refused to submit the special interrogatory. The record does not indicate the defendant excepted to such refusal. The jury was instructed, and no questions are now raised on the instructions. The jury returned a verdict for the plaintiff for \$5,000.00. Judgment was entered thereon. The defendant made a combined motion for judgment for the defendant notwithstanding the verdict, or, in the alternative, for a new trial, and the motion, after due consideration, was denied. The defendant has appealed.

It appears that on February 14, 1952 at about 6:00 p.m., Lawrence J. King, the plaintiff's intestate, a pedestrian, was walking across U. S. Highway 51, at a point about 1/2 mile south of Rockford, in a generally suburban shopping area. There are various types of stores, a church, a school and a residence on the east side of the highway, and several stores, a home, and certain vacant lots on the west side at the place concerned. The highway runs north and south and was known as 11th Street and the accident occurred in the 2900 block thereof. It is a cement highway, about

60 feet wide from curb to curb. There are two northbound traffic lanes and two southbound traffic lanes, with a center line between, in addition to sufficient room at the curbs on each side for a car to park parallel at either curb. The weather was clear and the pavement dry. The highway is level and there are no curves. The store lights in some of the stores on both sides were on and to some extent shown out and illuminated the highway some. There were also some arc or infra ray street lights, which were on. The street light fixtures were not right at the scene but some ways south of the point in question, though the light extended over the scene. The time of the incident was at night but the general scene where it occurred and the right-of-way appear to have been reasonably well lighted, although there was some evidence somewhat to the contrary.

There is no intersecting street or road at this particular point, although about 250 feet south of where the incident occurred there is evidently an east-west street or road, - Brooke Road, - that comes into U. S. Highway 51. How far north of the place where the incident happened there may be some intersecting or cross street or road is not made clear by the record. At the point where Lawrence J. King was walking across the highway there is no marked crosswalk and it was not an unmarked crosswalk at an intersection. But the public generally, including children, appears to have been in the custom of walking back and forth across the highway in that general area from east to west and vice versa, daytime and night time, in going to and coming from the various stores and other institutions on both sides of the highway.

60 feet wide from curb to curb. There are two sidewalks
- concrete on one side and two wooden sidewalks on the other
for a distance of 100 feet from the curb
on each side for a total width of 100 feet.
The street is about 100 feet wide. The sidewalk is
level and there are no curbs. The street lights are of
the type in which the light is on and is not set back
out and illuminated the highway more. There were also some
are on both sides of the street, which were on. The street
light fixtures were not light at the time but some were
south of the point in question, though the light extended
over the same. The line of the sidewalk was at right angles
the general road which is located at the right-of-way
appears to have been traversed with lights, although there
was some evidence furnished by the testimony.
There is no intersecting street or road at this
particular point, although about 250 feet south of where
the railroad crossing there is evidence of an east-west
street or road, - a narrow road, - that runs into it.
Highway 51. Now far north of the place where the railroad
crossing appears may be some intersecting or close street
or road it has been clear of the record, at the point where
Lawrence J. King was walking across the highway there is
no marked crosswalk and it was not an unmarked crosswalk
at the intersection. But the police testimony, indicating
evidence, appears to have been in the nature of walking
back and forth across the highway in that general area
from east to west and vice versa, during the night time,
in order to and coming from the various stores and other
localities on both sides of the highway.

The decedent's car was parked on the west side of the highway a little north and across the street from a grocery store on the east side. At the time, - about 6 p.m., - people were coming home and some parked and shopped on both sides of the street. The decedent on other prior occasions had walked across the highway at the point in question. The decedent Lawrence J. King was walking across the highway in a somewhat diagonal direction from northeast to southwest. In progressing across the highway he was at all times walking, not running. He was 59 years old. His general health was apparently good. He was wearing coveralls, the major part thereof being a medium blue, with a white stripe on them, and rubber galoshes.

At about this time the defendant William Ryman was driving, alone, in his automobile, a 1947 Kaiser Sedan, south on U. S. Highway 51, in one or the other of the southbound lanes or straddling them both, - the evidence is in some dispute as to that - at a speed variously testified to of about 25 to 35 m.p.h. The headlights on his car were lighted. The defendant was about 74 years old. He was employed at a school as a janitor and was on his way to work at the time. He had travelled back and forth over the area many times, was familiar with it, had seen people cross the street at this location, and knew of the public's general custom as to walking back and forth across the highway in that region. Visibility generally by motorists of pedestrians, and presumably by pedestrians of motorists, was reasonably good at the time and place in question.

The defendant's car was parked on the west side of the highway a little north and across the street from a grocery store on the east side. At the time, - about 6 p.m., - people were coming home from work and stopped on both sides of the street. The defendant and other prior occupants had waited across the highway at the point in question. The defendant happened to see walking across the highway in a southerly direction from northward to defendant. In approaching across the highway he saw an old woman, not running. He was 55 years old. His general health was apparently good. He was wearing overalls, the color just about black or medium blue, with a white stripe on them, and rubber galoshes. It about this time the defendant William Brown was driving alone, in his automobile, a 1937 Buick Sedan, south on U. S. Highway 21, in one of the lanes of the road and lanes or shoulders then built - the witness is in some dispute as to that - at a speed varying from 20 to 25 m.p.h. The defendant on his car was lit. The defendant was about 75 years old. He was employed at a school as a janitor and was on his way to work at the time. He had traveled back and forth over the area many times, was familiar with it, and knew people across the street at this location, and knew of the public's general custom as to walking back and forth across the highway in that region. Visibly driven by motorists or pedestrians, and presumably by pedestrians of motorists, was reasonably good at the time and place in question.

At or near, - and the evidence is in some dispute as to that, - the center line of the highway dividing the two northbound and two southbound lanes the defendant's car ran into the decedent or the decedent walked into the car, and the evidence is in some dispute as to that, - and the decedent suffered injuries from which he died. The defendant said he did not see the decedent before the impact. He said he applied his brakes immediately at the time of the impact.

The witnesses for the plaintiff were Robert Braun, Clarence Rowley, Stewart Mattoon, William Ryman (the defendant, called for cross examination under Section 60 of the Civil Practice Act), Charles Zanocco, Miriam Rudy (or Reedy), Sam Coppoletti, Charles Prichard, Irene Prichard, Robert Zimmerman, Henry Varnberg, and Anna B. King, (the plaintiff, as administrator). The witnesses for the defendant were Harold Ryman, and the defendant William Ryman, himself, (prior to an objection being sustained because of his disqualification under the Evidence Act). To the extent their testimony is presently material and insofar as it is not already covered by the foregoing summary, we shall now examine the same.

Robert Braun, a deputy sheriff, who investigated the accident at the scene afterwards said that when he arrived at about 6:15 p.m. the decedent's body lay on the pavement diagonally about 3 feet west of the center line, with the head in a southeasterly direction; there were skid marks on the pavement in the southbound lane nearest the center line, extending north from the body about 30 feet, which skid marks were not in a direct line, but extended easterly, and the closest they came to the center line was about 3 feet, or they extended easterly to within 3 feet of

the center line; he moved the defendant's car from the street and found that on the first depression of the brake pedal it depressed to the floorboard; he asked the defendant about the brakes and the defendant said that to make a quick stop you would have to give them an extra pump and after that the brakes set; the headlights and tail light on the car were in working order; neither headlight was broken; there was a dent on the left top side of the hood and the left side of the windshield visor was pushed down against the body of the car; the witness estimated it would require 100 feet to stop a car travelling 25 - 30 m.p.h. on dry pavement with the brakes in good order; he could not determine the point of impact between the car and decedent; the posted speed limit in the area is 45 m.p.h.; so far as he could determine the defendant's car had not been in anything other than its own southbound lane; he observed no dents or scratches on the bumper or front of the car; he could not determine where on the car the decedent had hit or been hit; the skidmarks were about 175-200 feet north of the intersection of U. S. Highway 51 and Brooke Road; while he was examining the brakes of the defendant's car on the west side of the highway he could see all persons standing out on the highway; standing there, he could, coming from the north, see a man 400 feet south; looking straight ahead, going south, automobile lights extended to the east curb of the highway; the street lights covered the whole width of the street; the witness estimated that at the scene a motorist going down the road and looking straight ahead could see a pedestrian walking at an angle on the road for 200 to 300 feet; at a later time, at the inquest, the defendant told the witness he did not see anything until he felt the thud on the top of the car, on the hood,

and the pedestrian went up on the top of his car and apparently was deflected by the visor.

William Ryan, the defendant, when examined under Section 60 of the Civil Practice Act, said he wore glasses and saw without difficulty; he was driving in the southbound lane; the highway was lighted by street lamps; the nearest light was on a corner about 300 feet away; his brakes always worked when he slammed them on; when he pumped his brakes the first time the brake would go to the floor without any braking; his lights shone ahead; he did not see the decedent until decedent hit him; decedent hit the side of the car and was thrown backward; there were no cars within 100 feet ahead of him; his lights covered a 30 feet wide strip of the road, - they were supposed to cover the width of the street.

Charles Zanocco, proprietor of a store on the east side of the highway, said the body of the decedent was lying probably a foot west of the center line, with the head towards the southeast.

Miriam Rudy (or Reedy), a passing motorist, driving north after the accident, said the decedent's body lay kitty-cornered across the middle line, the head southeast, and the feet northwest.

Sam Coppoletti, proprietor of a store on the east side of the highway, said the body of the decedent lay on the highway practically on the center (line) off to the side, a little bit, to the east.

Charles Prichard was driving south in his car on this highway following the defendant's car; he said the defendant's car was about 70 - 80 feet ahead of him and he was watching it; he was in the southbound lane toward the

and the investigation went up on the top of the hill and the
body was delivered by the victim.

William Brown, the defendant, when standing under
section 50 of the Civil Liberties Act, said he was standing
and was without difficulty; he was sitting in the woods
about 100 feet; the highway was lighted by street lights; the
main light was on a corner about 100 feet away; the
brown always seemed to be standing there; when he
passed the house the first time the house would be in the
front of him; the light was about 100 feet; he was
not on the corner until he reached the light; he was not
the side of the road and was facing backward; when he
on the side of the road; his light covered
50 feet when he was in the road, - they were standing in
over the side of the road.

Charles Brown, proprietor of a house on the
east side of the highway, said the body of the defendant
was lying probably a foot east of the house; when
the body was on the ground.

William Brown, a passing motorist, said
he was on the highway, said the defendant's body lay
fifty feet east of the house, the house was about
and the road was about.

Charles Brown, proprietor of a house on the
east side of the highway, said the body of the defendant
lay on the highway probably 100 feet east of the house; when
to the side, a little bit, to the west.

Charles Brown was driving south on his car on
this highway following the defendant's car; he said the de-
fendant's car was about 70 - 80 feet ahead of him and he
was standing it; he was in the neighborhood lane toward the

black center line; he saw an object fly from that car which he thought was a box or something and later found it was a body; the lights along the highway were, he said, very poor and it wasn't too well lit up; he did not see the object mentioned before its contact with the defendant's car or see where it came from; the defendant's car was in its own lane at the time of the impact; the witness was going 35 m.p.h. or maybe a little over and was not overtaking the defendant; the decedent's body lay on the black line, the head on the east side, the feet on the west side, at an angle; the defendant's car took up both southbound lanes for awhile, straddling them, and then more or less pulled over to the center line and it was then he saw the box like object appear.

Irene Prichard was riding with her husband, above, and afterwards she saw a body lying on the black center line on the pavement.

Robert Zimmerman was driving north in a car on this highway, in one of the northbound traffic lanes, at the time of the incident; he said he saw the decedent walking diagonally northeast to southwest across the street, from east to west, about 80 to 125 feet or 100 - 150 feet in front of the witness' car; he could clearly see the decedent; decedent walked, he did not run; at the impact of deceased and the defendant's car the deceased struck the left front fender or bumper, went up, and hit the windshield of the car or the top of the car at the top of the windshield, and was thrown over the top of the car; the lights of this witness' car were on the decedent as he was walking across. The decedent did not turn and look at the southbound traffic; the witness did not see the defendant's car

lines crossed line; in fact as if they had been
which is straight was a sort of straight and later found
it was a curve; the line was straight, he said,
very good and it wasn't too well; he said that
the object of the line was to be straight and the line
wasn't too far from the line; the line was
and was in fact the line of the line; the
whereas was going to be, in fact, a little over and
was not oversteering the line; the line was
on the line, the line was straight, the line was
the line, he said; the line was straight
both straight and straight, the line was
was of the line, the line was straight and it was
in fact the line was straight.

These things were said with the line, above,
and straight and the line was straight and the line
on the line.

The line was straight and the line was straight
this line, in fact of the line was straight, the
the line of the line; the line was straight and the line
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in fact of the line; the line was straight and the line
straight, the line was straight, the line was straight
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swerve just prior to the impact; the dim lights were on the witness' northbound car and would not have blinded the southbound defendant's car; he heard no horn sounded on defendant's car; the witness, with the lights on dim on his car, could see 300 - 400 feet ahead and could see the whole street.

Henry Vernberg was riding with Robert Zimmerman, on the right front seat of that northbound car; he said he saw the decedent come from the east curb, probably 50 feet ahead of them, and walk diagonally across the street at an angle; he saw the defendant's car coming from the north; the decedent walked into that car, - "it must have been the left side of the car", - "almost in the center (line) if it wasn't"; he heard no horn on the defendant's car; the decedent looked at, kept his eye on the car the witness and Zimmerman were in until the impact with the defendant's car; although the witness could not see the decedent's eyes he did not see the decedent turn his head toward the north; the witness could see anything up the highway about 300 feet and could see curb to curb on the street; the collision of decedent and defendant's car took place almost on the center line.

For the defendant, Harold Ryman, his son, said he is an automobile mechanic; he examined the brakes on the defendant's car by a driving test the day following the accident, he did not have to pump the brake pedal, and in his opinion they were safe.

The defendant William Ryman, on direct examination, said he was returning to work after supper, his lights were on, he was looking straight down the road.

On this appeal the defendant urges, in substance, that Lawrence J. King, the decedent, was guilty of contributory negligence proximately contributing to his injuries

...the light was on
the witness' statement - and not only not being obliged the
witness' statement's side; on being in fact obliged to
defendant's side; the witness, after the light on his
his car, could see 300 - 400 feet ahead and would see the
whole street.

Henry Ford was riding with his lights on
on the right hand side of the defendant's car; he said he
and the defendant came from the rear road, probably 30 feet
ahead of Ford, and with his lights on. He said he was
riding; he saw the defendant's car coming from the rear;
the defendant waited into Ford's car - "I would have been the
left side of the car" - "I was in the center (line) it is
Ford's"; he said he had no light on the defendant's car; the de-
fendant looked at, kept his eye on, and saw the witness and
the witness was in front of the defendant's car; the witness's
eye, although the witness could not see the defendant's eye;
he did not see the defendant's car and did not see the light;

the witness could see the light on the witness's car;
the witness could see the light on the witness's car;
the witness could see the light on the witness's car;
the witness could see the light on the witness's car;
the witness could see the light on the witness's car;

For the defendant, Henry Ford, his car, said he
is an absolutely sane man; he admitted the facts of the de-
fendant's car by a driving test the day following the acci-
dent, he did not have to have the license tested, but in his
opinion they were safe.

The defendant, Henry Ford, on direct examina-
tion, said he was watching for other cars, his lights
were on, he was looking straight ahead the road.
On cross-examination the defendant agreed, in substance,
that Lawrence J. King, the defendant, was guilty of contrib-
utory negligence proximately contributing to the injuries

and death as a matter of law and the Court erred in not allowing the defendant's motion for a directed verdict and in not allowing the defendant's motion for judgment notwithstanding the verdict; that on the issues of the decedent's alleged contributory negligence and the defendant's alleged negligence the verdict for the plaintiff is against the manifest weight of the evidence and the Court erred in not allowing the defendant's motion for a new trial; and that the Court erred in refusing to submit to the jury the defendant's special interrogatory and erred in not allowing the defendant's motion for a new trial for that reason also.

Under the Civil Practice Act and Supreme Court Rule 22, (CH. 110 ILL. REV. STATS., 1953, par. 259.22):

"The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the Court to direct a verdict without submitting the case to the jury."

A motion by a defendant for a directed verdict and a motion by a defendant for judgment notwithstanding the verdict present a question of law as to whether, when all the evidence is considered, together with all reasonable inferences and intendments from it in its aspect most favorable to the plaintiff and if considered as true, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case; on such motions if there is evidence which, standing alone, fairly tends to prove the essential elements or allegations, the motions must be denied; a verdict of a jury may not be set aside merely because the jury might have drawn different inferences or merely because a judge may possibly feel that other inferences or conclusions than the one drawn might be more reasonable: HEIDMAN v. KELSEY etc. et al. (1953)

414 Ill. 453; CITY OF MONTICELLO v. LE CRONE et al. (1953)
414 Ill. 550; LINDROTH v. WALGREEN CO. et al. (1950) 407
Ill. 121; MERLO etc. et al. v. PUBLIC SERVICE CO. et al.
(1943) 381 Ill. 300; HUNT v. VERMILION COUNTY CHILDREN'S
HOME et al. (1942) 381 Ill. 29; whenever facts are in dis-
pute or the evidence is such that fair minded men may draw
different inferences, a measure of speculation and conjec-
ture from the evidence is required on the part of those
whose duty it is to settle the dispute by choosing what
seems to them to be the most reasonable inference, and it
is only when there is a complete absence of probative
facts to support the conclusion reached that reversible
error on this grounds may appear: LINDROTH v. WALGREEN
CO. et al., supra; LAVENDER v. KENN 327 U. S. 645, 66 S.
Ct. 740.

On a motion for a new trial the court may weigh
the evidence for the purpose of determining whether the
jury's verdict is contrary to the manifest weight of the
evidence; if the Court so finds a new trial should be
granted; if it does not, a motion for new trial should be
denied, so far as that grounds is concerned; and if this
Court finds the verdict is contrary to the manifest weight
of the evidence we will hold the trial court erred in not
allowing a motion for new trial, if that was its action;
but if we do not so find then the trial court's action in
not allowing a motion for new trial is not error, so far
as that grounds is concerned: HEIDEMAN v. KELSEY etc. et
al., supra.

The question of whether a plaintiff or his de-
cedent has been guilty of contributory negligence proxi-

mately contributing to his injuries or death is ordinarily and preeminently a question of fact upon which the plaintiff (as well as the defendant) is entitled to have the finding of a jury; it can become a question of law only when, from the undisputed facts, all reasonable minds, in the exercise of a fair and honest judgment, would be compelled to reach the conclusion that there was contributory negligence; the obligation of exercising reasonable care is a duty which constantly attends every individual, plaintiff or defendant, but whether in a given situation it requires the doing of a certain specific, particular act or thing depends upon the circumstances: LASKA v. MEIER et al. (1946) 394 Ill. 71; contributory negligence cannot be defined in exact terms and unless it can be said the action of the plaintiff or decedent is clearly and palpably negligent it is not within the province of the court to substitute its judgment for that of the jury which is provided for the purpose of deciding this as well as all other questions of fact: BLUMB etc. v. GETZ (1937) 366 Ill. 273; so long as a question remains whether the plaintiff or his decedent has performed his legal duty or has observed that degree of care and caution imposed by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact: PETRO etc. v. HINES etc. (1921) 299 Ill. 236; only a case approaching a gross miscarriage of justice would warrant us in reversing a judgment on the grounds the plaintiff was guilty of contributory negligence proximately contributing to his injuries or death as a matter

likely contributing to his injuries or death is ordinarily and practically a question of fact upon which the plaintiff (as well as the defendant) is entitled to have the finding of a jury; it can become a question of law only when, from the undisputed facts, all reasonable minds, in the exercise of a fair and honest judgment, would be compelled to reach the conclusion that there was contributory negligence; the obligation of exercising reasonable care in a duty which constantly attends every individual, plaintiff or defendant, but whether in a given situation it requires the doing of a certain specific, particular act or thing depends upon the circumstances: WILKINS v. WILKINS et al. (1946) 324 Ill. 71; contributory negligence cannot be defined in exact terms and unless it can be said the action of the plaintiff or decedent is clearly and palpably negligent it is not within the province of the court to substitute its judgment for that of the jury which is provided for the purpose of deciding this as well as all other questions of fact: WILKINS v. WILKINS (1937) 366 Ill. 273; to lose as a question remains whether the plaintiff or his decedent has performed his legal duty or has observed that degree of care and caution imposed by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact: WILKINS v. WILKINS et al. (1937) 366 Ill. 276; only a case involving a gross miscarriage of justice could warrant us in reversing a judgment on the grounds the plaintiff was guilty of contributory negligence proximately contributing to his injuries or death as a matter

of law; KETUROSKY v. INDIANA etc. R. R. Co. et al. (1953) 1 Ill. App. (2) 88; where a cause is tried before a jury it is the province of the jury, primarily, to determine the weight of the evidence and the credibility of the witnesses, and the utmost caution should be exercised to uphold the sanctity of trial by jury: PEOPLE V. HANISCH (1935) 361 Ill. 465; SOURIAN et al. v. JONES (1953) 350 Ill. App. 365.

Where, as here, an injury results in death and the personal representative of the decedent brings a suit for the alleged wrongful death, the plaintiff, of course, as one essential element of his or her case, must show that the decedent was in the exercise of due and reasonable care at the time, but it is not necessary to prove such care by direct testimony, - such may be shown by circumstantial evidence, - and, if there is an eye witness who saw the infliction of the injury, the jury must then determine from the testimony of that witness, as well as all other witnesses, and from all the material facts and circumstances in evidence surrounding the injury whether the decedent was careful or guilty of contributory negligence proximately contributing to the injury and death: PETRO etc. v. HINES etc., supra; in considering the question of due care on the part of the decedent it is well to remember that this cannot always be shown by direct proof, but that the evidence as adduced by the plaintiff should disclose facts from which it may reasonably be inferred that the decedent was in the exercise of due care: BLUMB etc. v. GETZ, supra.

A failure, if there be a failure, by a pedestrian on a street or highway to look for approaching vehicles is not contributory negligence as a matter of law and will

of law; Kelly v. Industrial Co. et al. (1922) 4 Ill. App. (2) 38; where a case is cited before a jury it is the province of the jury, finally, to determine the weight of the evidence and the credibility of the witnesses, and the utmost caution should be exercised to up-

hold the sanctity of trial by jury: Smith v. Smith

(1922) 361 Ill. App. 462; Smith et al. v. Smith (1922) 350 Ill. App. 362.

There, as here, an injury results in death and the personal representative of the deceased brings a suit for the alleged wrongful death, the plaintiff, of course, as the essential element in his or her case, must show that the deceased was in the exercise of due and reasonable care at the time, but it is not necessary to prove such care by direct testimony, - each may be shown by circumstantial evidence, - and, if there is an eye witness who saw the infliction of the injury, the jury must then determine from the testimony of that witness, as well as all other witnesses, and from all the material facts and circumstances in evidence surrounding the injury whether the deceased was guilty or guilty of contributory negligence proximately

contributing to the injury and death: Smith et al. v. Smith

etc., supra; in considering the question of due care on the part of the deceased it is well to remember that this cannot always be shown by direct proof, but that the evidence as adduced by the plaintiff should disclose facts from which it may reasonably be inferred that the deceased was in the exercise of due care: Smith et al. v. Smith, supra. A failure, if there be a failure, by a pedestrian

on a street or highway to look for approaching vehicles is not contributory negligence as a matter of law and will

not as a matter of law bar a recovery, - that fact is proper for the consideration of the jury in determining whether the party has been negligent, but it is a question of fact for the jury to determine, in view of all the surrounding circumstances, whether the failure to look, under the circumstances, constitutes lack of due care: MORRISON v. FLOWERS (1923) 308 Ill. 189; HEIDENREICH v. BRENNER et al. (1913) 260 Ill. 439; WINN etc. v. CLEVELAND etc. RY. CO. et al. (1909) 239 Ill. 132; a pedestrian's failure, if there be a failure, to keep a constant lookout for approaching traffic is not contributory negligence as a matter of law, but it is a question for the jury whether, under all the circumstances, including that circumstance, he was in the exercise of ordinary care for his own safety: MORAN v. GATZ (1945) 390 Ill. 478.

The gist of the defendant's argument in the case at bar to the effect that the decedent Lawrence J. King was guilty of contributory negligence proximately contributing to his injuries and death as a matter of law and that the Trial Court erred in not allowing the defendant's motion for a directed verdict and in not allowing his motion for judgment notwithstanding the verdict is, in substance, that, at a point which was not a marked crosswalk or an unmarked crosswalk at an intersection, the decedent at night was walking diagonally from northeast to southwest across a four lane, 60 foot, well travelled cement highway, in a suburban shopping area, - walked across the center line and into the left front of the defendant's southbound car in one of the southbound traffic lanes, having crossed both northbound traffic lanes, - did not look at the approaching southbound traffic in the southbound lanes from the time he left the

not as a matter of law but a question of fact, - that fact is proper for the consideration of the jury in determining whether the party has been negligent, and it is a question of fact for the jury to determine, in view of all the surrounding circumstances, whether the driver to look, under the circumstances, committed any of the errors: WATSON

v. WATSON (1907) 202 Ill. 122; WATSON v. WATSON 21

Ill. (1913) 200 Ill. 473; WATSON v. WATSON 21

Ill. (1909) 202 Ill. 122; WATSON v. WATSON, 21

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Ill. (1909) 202 Ill. 122; WATSON v. WATSON, 21

v. WATSON (1907) 202 Ill. 122.

The gist of the defendant's argument in the case

is that the fact that the deceased Lawrence J. King was

negligent of contributory negligence practically compensating

to his injuries and death as a matter of law and that the

trial court erred in not allowing the defendant's motion

for a directed verdict and in not allowing his motion for

judgment notwithstanding the verdict is, in substance, that

at a point which was not a marked crosswalk or an unmarked

crosswalk at an intersection, the defendant at night was

walking diagonally from northwest to southeast across a four

lane, 60 feet, well travelled concrete highway, in a suburban

residential area, - walked across the center line and into the

left front of the defendant's southbound car in one of the

southbound traffic lanes, having crossed both northbound

traffic lanes, - did not look at the approaching southbound

traffic in the southbound lanes from the time he left the

east curb until the impact, - failed to keep a proper lookout for southbound traffic, - and was continuously facing or watching the northbound traffic.

It is true that CH. 95 1/2 ILL. REV. STATS., 1953,
par. 172 (a) provides that:

"Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

But subparagraph (d) of the same par. 172 also provides that:

"Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

It is our understanding that although the decedent pedestrian doubtless was under the circumstances required to exercise a high degree of care, such a statute does not give a vehicle on the roadway the right of way over all pedestrians on the roadway under any and all circumstances; each case must be considered in the light of all the facts and circumstances surrounding it and each case must be determined from its particular facts; the vehicle's right-of-way is not absolute merely because it and the pedestrian happen to be on the highway at the same time, and that is made particularly clear by the provisions of subparagraph (d); and a pedestrian within the terms of the statute is not guilty of contributory negligence per se so as to bar his suit as a matter of law: MORAN v. GATZ, supra; TRENNERT v. COE, Gen. No. 10783, a recent case in this Court not yet reported; PARKIN v. RIGDON (1954) 1 Ill. App. (2) 586.

The decedent pedestrian, as well as the defendant motorist had a right to be upon the highway: PEOPLE v.

case and will be heard, - it is to keep a clear path-
out for pedestrian traffic, - and not conversely to close
or obstruct the pedestrian traffic.

It is true that in 1923, 1924, 1925, 1926,

Dec. 178 (a) provided that:

"Every pedestrian crossing a roadway at any point
other than a marked crosswalk or within an
unmarked crosswalk at an intersection shall yield
the right-of-way to all vehicles upon the roadway."

but subparagraph (b) of the same Dec. 178 also pro-

vided that:

"Notwithstanding the provisions of this section every
driver of a vehicle shall exercise due care to avoid
colliding with any pedestrian upon any roadway and
shall give warning by sounding the horn when nec-
essary and shall exercise proper precaution upon ob-
serving any child or any confused or inebriated
person upon a roadway."

It is our understanding that although the decedent
pedestrian crossed the highway under the circumstances related to
exercise a high degree of care, such a statute does not give
a vehicle on the roadway the right of way over all cases -
times on the roadway under any and all circumstances; such
case must be considered in the light of all the facts and
circumstances surrounding it and each case must be deter-
mined from its particular facts; the vehicle's right-of-way
is not absolute merely because it and the pedestrian happen
to be on the highway at the same time, and that is made par-
ticularly clear by the provisions of subparagraph (b); and
a pedestrian within the terms of the statute is not guilty
of contributory negligence per se so as to bar his suit as
a matter of law: Smith v. State, 1923, 1924, 1925, 1926.

Dec. 10, 1923, a recent case in this Court not yet reported;

Smith v. State (1924) 111. Dec. (2) 586.

The decedent pedestrian, as well as the defendant

motorist had a right to be upon the highway: Smith v.

PREYBYL (1937) 365 Ill. 515. It was not contributory negligence per se or as a matter of law for the decedent pedestrian to be there, - he and the defendant both had a right to use the highway and both had mutual obligations, each to the other, to observe their reciprocal rights:
BLUMB etc. v. GETZ, supra.

That the particular point where the decedent was walking across the highway was not a marked crosswalk or an unmarked crosswalk at an intersection did not necessarily give the defendant motorist an absolute right of way over the decedent pedestrian under any and all circumstances and does not, of itself, constitute contributory negligence per se or as a matter of law, although such facts are perfectly proper for the jury to take into consideration, along with all other material facts and circumstances in evidence, in determining the issue as to the decedent's exercise of due care.

The fact the decedent was walking diagonally across the highway, from northeast to southwest, and not in a direct east-west direction, does not constitute contributory negligence as a matter of law, although that fact also is certainly proper for the jury to take into consideration: HOEBLER v. VOELPEL (1927) 246 Ill. App. 69.

That the decedent did not look at the approaching southbound traffic in the southbound lanes, if he did not, or that he failed, if he did, to keep a constant lookout for such approaching traffic, is not contributory negligence as a matter of law, but, again, any competent evidence as to those facts is proper for the jury's consideration, along with all other material facts and circumstances in evidence, in determining the issue as to decedent's exercise of due care.

WHEELER v. WHEELER (1927) 302 Ill. 511. It was not, undoubtedly, an
evidence that it was a matter of law for the court to
deduction to be made, - in the absence of both a
right to use the highway and both legal and equitable
claim to the same, to operate their personal rights;
WHEELER v. WHEELER, supra.

That the defendant's claim is a claim of a
claim against the highway and not a claim of a
an abstract ownership of an interest in the highway is
clear from the fact that it is a claim of a right of way
the defendant's claim is not a claim of a right of way
and does not, of itself, constitute a claim of a right of way
for so far as a matter of law, although the fact is not
clearly proper for the law to take into consideration, along
with all other material facts and circumstances in evidence,
in determining the issue as to the defendant's right of way
the case.

The fact that defendant, was seeking compensation
against the highway, from neither of its owners, and was
in a direct west-east direction, does not constitute con-
tributory negligence as a matter of law, although that fact
also is certainly proper for the law to take into consid-
eration: WHEELER v. WHEELER (1927) 302 Ill. 511. 512.

That the defendant did not look up the approaching
westward traffic is an immaterial issue, if he did not,
or that he failed, if he did, to keep a constant lookout
for such approaching traffic, is not contributory negligence
as a matter of law, and, again, the defendant's right of way
does not for the purpose of the law's consideration, along
with all other material facts and circumstances in evidence,
in determining the issue as to the defendant's right of way

As to the decedent's continuously facing or watching the northbound traffic, there would seem to be nothing abnormal in that conduct for a pedestrian proceeding from the east to the west across a north-south highway on which there was both northbound and southbound traffic; the northbound lanes were the first he had to cross and necessarily his first duty was to watch and observe such northbound traffic; that is not to say that he was under no duty to, at some point, take into account the possibility of there being southbound traffic, but normally the decedent, in the position he was in, might reasonably assume that the southbound traffic would be on the west side of the center line of the highway and he had no absolute duty to yield a right-of-way to southbound traffic when and during the time he was east of the center line in that part of the highway where the northbound traffic was required to travel, and the determination of at what point, under all the circumstances, due care on his part required that he take into account, or look at, or lookout for southbound traffic was a typical jury fact question: JONES v. STANDERFER et al. (1938) 296 Ill. App. 145.

Whether the decedent, as the defendant argues, walked across the center line and into the left front of the defendant's southbound car in one of the southbound traffic lanes, having crossed both northbound traffic lanes, - or whether the accident happened in a somewhat different manner and at a somewhat different point, - is controversial and the evidence presents a jury fact question as to that. There is some evidence and facts and circumstances from which the defendant may properly urge the inferences and conclusions contained in his argument on this point. But

to the decedent's occasionally feeling or
witnessing the northbound traffic, there could seem to be
nothing abnormal in that conduct for a pedestrian pro-
ceeding from the east to the west across a north-south
highway on which there was both northbound and southbound
traffic; the northbound lanes were the first he had to
cross and necessarily his first duty was to watch and ob-
serve such northbound traffic; that is not to say that he
was under no duty to, at some point, take into account the
possibility of there being southbound traffic, but normally
the decedent, in the position he was in, might reasonably
assume that the southbound traffic would be on the west side
of the center line of the highway and he had no absolute
duty to yield a right-of-way to southbound traffic when
and during the time he was east of the center line in that
part of the highway where the northbound traffic was re-
quired to travel, and the ascertainment of that point,
under all the circumstances, was due on his part required
that he take into account, or look at, or consider the south-
bound traffic was a typical jury fact question: Id. v.
Stapleton et al. (1938) 236 Ill. App. 145.
Whether the decedent, as the defendant argues,
walked across the center line and into the left front of
the defendant's southbound car in one of the southbound
traffic lanes, having crossed both northbound traffic lanes,
- or whether the accident happened in a somewhat different
center and at a somewhat different point, - is controversial
and the evidence presents a jury fact question as to that.
There is some evidence and facts and circumstances from
which the defendant may properly urge the inferences and
conclusions contained in his argument on this point. But

there is also some evidence and facts and circumstances bearing, particularly, on the position of the defendant's car just prior to the impact, the position of the decedent's body on the pavement after the impact, the trajectory of the body after the impact, the extent, nature, and direction of the skid marks on the pavement, the dent on the left top side of the hood of the car, the fact the left side of the windshield visor was pushed down against the body of the car, the defendant's conversation with the witness Braun at the inquest, the course and direction of the defendant's car immediately prior to the impact, and the testimony, for example, of the witnesses Charles Prichard, Robert Zimmerman, and Henry Vernberg, from which different inferences and conclusions can properly be drawn, and apparently were drawn by the jury. Under all the evidence and facts and circumstances it would not be a completely unwarranted inference or conclusion for the jury to draw, if they did, that the impact occurred at, or extremely close to, and perhaps right on the center line dividing the northbound and southbound traffic lanes, that the defendant's car, straddling the two southbound lanes for awhile before, and then pulling over to the center line just immediately before the impact, was at the moment travelling slightly, perhaps almost imperceptibly, but nevertheless certainly, southeasterly, and at least the left or east side thereof may have been on or about on the center line, perhaps, though not necessarily, projecting slightly eastward over the line, but in just enough juxtaposition, or proximity thereto as to strike the decedent or for the decedent to brush against it when he had, unfortunately, arrived at precisely the same point at precisely the same time.

All of the other material facts and circumstances

of the case, in evidence, besides those already mentioned, have to be considered on the issue of contributory negligence. The area was a generally suburban shopping region; the highway was level and had no curves; the weather was clear and the pavement dry; though at night, the scene was reasonably well lighted; there was no regular crosswalk or sidewalk in the nearby neighborhood by which pedestrians could get across the highway; it was the public's accepted custom to walk back and forth across the highway at that point; the defendant knew the road, the region, and the public's custom of crossing it; the decedent had on other occasions so crossed it; he at all times was walking, not running; at least some parts of his clothing were of a light color that ought to have been rather visible; the defendant's headlights were on, covered the road, and must have shown on the decedent; pedestrians were visible for several hundred feet up and down the highway; the decedent was clearly visible 80 - 150 feet ahead of a northbound motorist at the time; and the northbound motorist's lights were shining on the decedent.

Under all the evidence and facts and circumstances, with all reasonable inferences and intendments therefrom, in their aspect most favorable to the plaintiff, and if considered as true, we cannot say there is a total failure or lack of evidence to prove due care by the decedent; there is some evidence fairly tending to prove due care; we are not at liberty to set aside the jury's verdict merely because the jury might have drawn different inferences and conclusions, or merely because we might feel, if we did, that other inferences and conclusions than the one drawn might be more reasonable; the jury has necessarily drawn inferences

and conclusions from the evidence, as it had to, - which, we must assume, seemed to them reasonable, - and there is no complete absence of facts to support the same. The question of whether the decedent was guilty of contributory negligence proximately contributing to his injuries and death was a question of fact here, as it ordinarily and preeminently is, upon which the plaintiff (as well as the defendant) was entitled to have the finding of the jury. We do not believe that all reasonable minds would be compelled to reach the conclusion there was such contributory negligence. Under the circumstances the conduct of the decedent was not clearly and palpably negligent. The case does not approach a gross miscarriage of justice. Accordingly, there was no error in denying the motion for directed verdict and the motion for judgment notwithstanding the verdict.

As to the motion for new trial, this involves the issue of alleged negligence of the defendant, in addition to due care of the decedent. We think there is sufficient evidence as to alleged negligence, - relating to speed, observation, no use of horn, mechanical and operating condition of brakes, and direction of driving, in addition to the other circumstances previously referred to, - to make that a jury question. And what we've already said on due care and contributory negligence is sufficient to indicate we believe that a jury question. We do not consider the verdict against the manifest weight of the evidence as to those issues and those grounds for the motion for new trial are not, we believe, tenable.

Although the facts in each are not identical in all respects with those in the case at bar, BLUMB etc. v. GETZ, supra, and 294 Ill. App. 432, SYNWALT etc. v. KLUNK et

al. (1938) 296 Ill. App. 79, JONES v. STANDERFER et al., supra, and HOGBLER v. VOLLMER, supra, are as close on their facts to the instant case as any we've been cited or have found, and they all hold, in effect, that contributory negligence or due care is, under the facts, a jury question and all sustain jury verdicts for the plaintiff.

We have considered all the cases cited by the defendant. Some we have already referred to. Of the balance, evidently, so far as we can ascertain, LA PRISK etc. v. CARR - LEASING, INC. (1945) 326 Ill. App. 514, APPEL v. JEGON et al. (1952) 348 Ill. App. 548, O'HERN etc. v. CHICAGO CITY RY. CO. (1909) 151 Ill. App. 208, GOOD v. BEHRMUT (1944) 321 Ill. App. 303, HOOPER etc. v. ADAMS EXPRESS CO. (1919) 289 Ill. 169, JACKSON v. ROBANCHUK (1949) 337 Ill. App. 282, ROSS etc. v. CRANK (1939) 303 Ill. App. 25, and PASTORE etc. v. SASSO (1943) 317 Ill. App. 538 are the only cases which involve a pedestrian-vehicle accident. None of them appear to have the same or substantially the same facts as the case at bar and some involve quite different facts. We do not believe them applicable here.

As to the remaining grounds for the motion for new trial, we think, - laying aside whether the defendant can now complain, having not excepted to the refusal thereof, - there was no error in refusing to submit to the jury the defendant's special interrogatory.

CH. 110 REV. STATS., 1953, par. 189, provides:

"In any case in which the jury render a general verdict, they may be required by the court, and must be required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before

1. (1938) 356 Ill. App. 70, People v. ...
and People v. ..., where, as is clear from the
facts in the instant case we have been cited as have
found, and they all hold, in effect, that contradictory
evidence on the same facts, under the facts, a jury decision
and all evidence is competent for the jury.

We have considered all the cases cited by the de-
fendant. Some we have already referred to. Of the balance,
available, so far as we can ascertain, People v. ...
- People v. ... (1943) 356 Ill. App. 514, People v. ...
Ill. (1932) 348 Ill. App. 246, People v. ... v. People v. ...
Ill. (1909) 151 Ill. App. 208, People v. ... (1944) 321
Ill. App. 303, People v. ... (1919) 253
Ill. 169, People v. ... (1949) 377 Ill. App. 285,
People v. ... (1919) 303 Ill. App. 25, and People v. ...
v. People v. ... (1943) 377 Ill. App. 256 are the only cases which
involve a pedestrian-vehicle accident. None of them appear
to have the same or substantially the same facts as the case
at bar and some involve quite different facts. We do not
believe them applicable here.

As to the remaining grounds for the motion for new
trial, we think, - having aside whether the defendant can
now complain, having not exhausted to the trial court, -
there was no error in failing to submit to the jury the de-
fendant's special interrogatory.

ON 110 MAY 1953, OR 119, PROVIDED:

"In any case in which the jury render a general
verdict, they may be required by the court, and must
be so directed, to answer of any party to the action, to
the effect that upon any material question of fact
of fact which shall be asked of them in writing,
which question or fact shall be submitted by the
party requesting the same to the adverse party before

the commencement of the argument to the jury. Submitting or refusing to submit a question of fact to the jury when requested by a party, as above provided, may be excepted to and be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly."

The special interrogatory proposed was not a "material question" or "question of fact" within the meaning of the statute. It read, as we've earlier set out:

"Do you find from the evidence that the plaintiff's intestate could have avoided the accident and injury in question by exercising ordinary care and caution for his own safety just before and at the time and place of the happening thereof?"

As the defendant suggests, practically the same type of special interrogatory was given in CHICAGO UNION TRACTION CO. v. LUDLOW (1903) 108 Ill. App. 357, but the only reference to it in the opinion is that it was given and its effects are discussed; apparently, no question was presented as to the propriety of the interrogatory and the Court does not pass, one way or the other, on its propriety.

A question for a special interrogatory must be single, direct, and relate to an ultimate and controlling fact in the case, upon which the rights of the parties directly depend, and not to evidentiary facts or facts from which the ultimate fact may be deduced by reason or argument: ILLINOIS STEEL CO. v. MANN (1902) 197 Ill. 186; FIREMANS INS. CO. v. APPLETON etc. CO. (1896) 161 Ill. 9; where the ultimate fact which would control a general verdict is to be determined by a jury it is not error to refuse to submit a special interrogatory, the answer to which would not determine the jury's finding as to that fact: LEONARD v. STONE (1942) 381 Ill. 343; a special interrogatory asking whether a decedent was in the ex-

[illegible][illegible]

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the individuals involved. This information will be used to develop a plan of action.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the activities of the British Security Co-ordination Organisation (B.S.C.O.) in the United States.

[illegible]

Insert: Very early morning - 10:00 AM - 10:30 AM
 Date: 10/10/1965 (1965) 10:00 AM - 10:30 AM
 Field work was done in the morning.

ercise of due care and caution at the time of death would be proper as calling for a finding of an ultimate fact, but an interrogatory asking whether the decedent was in the exercise of due care and caution in failing to use appliances to insulate himself is improper as calling for a finding upon an evidentiary fact: FRISOLLY etc. v. BLOOMINGTON etc. CO. (1916) 271 Ill. 622; an interrogatory is not proper unless some answer responsive thereto would be inconsistent with some general verdict that might be returned: SMITH v. SANITARY DISTRICT, etc. (1913) 260 Ill. 453.

A special interrogatory which asks, in substance, whether the injured or deceased person could, - or could not, - have avoided the accident or injury by the exercise of ordinary care, is not proper because it does not call for an ultimate fact, namely, whether the injured or deceased person in fact exercised due care, but rather calls for evidentiary facts or for a conclusion from which the parties can endeavor to argue or deduce the corollary that he did or did not exercise due care: NELSON et al. v. RICHARDSON et al. (1903) 108 Ill. App. 121; such does nothing more than instruct the jury to suggest some theory by which the accident could have been avoided, - if answered, whether one way or the other, it merely raises an argument on an academic, theoretical matter, - speculation as to how the accident might have been avoided does not decide, one way or the other, the ultimate fact as to whether the plaintiff exercised ordinary care at the time: REAGAN v. BORGESON (1912) 173 Ill. App. 100.

Accordingly, there is no error in the matters urged, and the judgment will be affirmed.

AFFIRMED.

...and the ...
...and the ...

...

"Whereas, the parties hereto consider it to their best interests and to the best interests of their said minor children to settle between the parties hereto now and forever

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their respective rights to support, dower rights, homestead rights, rights of support of the minor children and any and all other rights of property and otherwise growing out of the marriage relationship existing between them, or which either of them now has or may hereafter have or claim to have against the other of them; and all rights of every kind, nature and description which either of them now has or may hereafter have or claim to have in and to any property, of every kind, nature and description, real, personal or mixed, now owned or which may hereafter be acquired by either of them; and

"Whereas, each of the parties acknowledges that each has been fully informed of the wealth, property and income of the other, and of his or her respective rights in the premises;

"Now, Therefore, for and in consideration of the mutual covenants herein contained, and for other good and valuable considerations, the receipt and sufficiency whereof are hereby acknowledged, the parties hereto do hereby freely and voluntarily agree as follows:

"1. Wife agrees to waive all alimony and rights to support, past, present and future.

"2. Wife agrees that the 1950 Buick automobile presently in the possession of Husband shall be and remain the separate property of Husband.

"3. Husband agrees to convey by appropriate instrument all his right, title and interest in and to the real estate of the parties located at 145 S. Lombard Avenue, Lombard, Illinois, subject to the presently existing mortgage indebtedness which is assumed by Wife who agrees to indemnify Husband for any loss he may suffer as a result of the failure of Wife to pay the installments on said mortgage as they come due.

"4. That parties hereto agree that in the event a decree of divorce is entered in said suit such decree may award the care, custody, control and education of Sherri Lynne Sikkema and Richard D. Sikkema, the minor child of the parties hereto, to Wife, subject to the right of visitation of Husband at reasonable times and hours.

"5. Husband agrees that said decree may order and direct Husband to pay the sum of Forty (\$40.00) Dollars each week for the support and maintenance of said minor children, until further order of Court.

"6. Husband agrees that all of the furniture and furnishings of the parties may be awarded to Wife by said decree.

"7. Except as herein otherwise expressly provided, each of the parties hereto covenants and agrees that each party shall have and retain sole and exclusive right, title and interest, respectively, in and to each and all of the personal property in his or her respective control at the date of this agreement, or in his or her respective possession, including in said personal property all choses in action, bank balances, royalties, bonds, stocks and other securities.

"8. It is mutually agreed between the parties that neither party will be responsible for any personal debts contracted by the other party subsequent to the date of this agreement.

"9. Each of the parties agree that they will, upon demand by the other, at any time hereafter, execute any and all instruments and documents as may be reasonably necessary to release their respective interests in any property belonging

[illegible]

to the other except as herein provided; the intention being that the property settlement provided for in this agreement shall constitute a complete adjustment of the property rights of the parties hereto.

"10. In the event the Circuit Court of Cook County in said contemplated suit for divorce sees fit to award the Wife a divorce from Husband, then it is agreed that this agreement shall survive any judgment or decree entered in such cause, and shall thereafter be binding and conclusive on the parties whether or not referred to or made a part of such judgment or decree. In the event the Circuit Court of Du Page County, Illinois in said contemplated suit for divorce refuses to grant Wife a divorce from Husband, then said agreement shall be void and of no force or effect whatsoever.

"11. Except as hereinabove provided, each of the parties hereto does hereby (to the fullest extent that he or she may lawfully so do without voiding this contract) forever relinquish, release, waive and quitclaim to the other party hereto all rights of dower and homestead and all property rights and claims which he or she now has or may hereafter have as husband, wife, widower, widow or otherwise, by reason of the marital relations now existing between the parties hereto under any present or future law of any State or of the United States of America or of any other country, in or to, or against the property of the other party, or his or her estate, whether now owned or hereafter acquired by such other party, and each of the parties hereto further covenants and agrees for himself and herself and his or her heirs, executors, administrators and assigns, that he or she will never at any time hereafter sue the other party or his or her heirs, executors, administrators or assigns, for the purpose of enforcing any or either of the rights specified in and relinquished under this paragraph.

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"12. This agreement shall be binding upon the heirs, executors, administrators, devisees, grantees and assigns of the parties hereto."

On December 28, 1953, Marjorie M. Sikkema filed in the circuit court of Du Page County her complaint for divorce alleging her residence in Du Page County, her marriage to the defendant on August 3, 1946, the birth of two children, and charging her husband with having deserted her on December 1, 1952, and persisting in such desertion. She prayed for a divorce, the custody of her children, and the payment to her of permanent support for herself and children, and for attorney fees. The appearance of the defendant was entered, and on the following day an answer was filed admitting the allegations of the complaint as to the residence of the parties, their marriage, the birth of the children, and that, from the date of their marriage, until on or about December 1, 1952, they had lived together as husband and wife. The answer denied that the plaintiff was a good, true, kind and affectionate wife and denied that he wilfully deserted and absented himself from his wife on December 1, 1952, denied that he had persisted in such desertion, and concluded that the plaintiff was not entitled to any relief.

On the same day the answer was filed, a hearing was had resulting in a decree finding, among other things, that the parties had not cohabited together as man and wife since December 1, 1952, and that defendant has been guilty of the wilful desertion of the plaintiff, having deserted and absented himself from the plaintiff on December 1, 1952, and has persisted in such desertion without fault on the part of the plaintiff as charged in the complaint.

"11. This agreement shall be binding upon

the heirs, executors, administrators, devisees,

successors and assigns of the parties hereto."

On November 20, 1925, Plaintiff filed in

the Circuit Court of the State of New York a

petition for judgment in the County of New York, New York, in

defendant on August 1, 1925, and thereon Plaintiff

submitted her petition with proof of service on December 1,

1925, and proceeding in said petition, she prayed for a

decree, the granting of her claims, and her expenses in her

of permanent support, the custody and education, and the support

of her children, and the custody and education, and the support

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The court further found that the parties had entered into an agreement as to their respective property rights and for the support of their minor children, and the agreement was set forth in full in the decree. The decree approved this agreement in all its details and awarded the plaintiff a divorce on the ground of desertion. This decree was filed and approved by the court on January 25, 1954.

On February 24, 1954, the defendant, by his present attorney who did not represent him at the time the defendant filed his answer to the complaint for divorce or at the time of that hearing, filed his unverified petition praying for an order vacating the decree and setting the cause for retrial upon the complaint and answer. This petition was subsequently amended, and a verification by the attorney representing petitioner was added on April 30, 1954. The respondent in the petition to vacate, the original plaintiff, Marjorie M. Sikkema, presented her motion to strike the amended petition, and upon a hearing the chancellor entered the following order, viz.: "On hearing of petition to vacate decree of divorce and on subsequent motions and petitions herein filed and the court having considered all of the evidence and having jurisdiction of the parties hereto and the subject matter hereof, it is ordered that the petition to vacate the decree of divorce heretofore filed be and is hereby denied." To reverse this order, petitioner, Richard D. Sikkema, appeals.

The unverified petition to vacate the decree was not signed by petitioner but by his attorney and is as follows; viz.:

"Your petitioner, Richard D. Sikkema, defendant in the above entitled cause, represents to the Court as follows:

The above is a copy of the original document and is not a translation of the original document. The original document is in the possession of the Department of the Interior, Bureau of Indian Affairs, and is being furnished to you for your information.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. He or she will usually have a briefing from the person who has referred the case to the investigation. This briefing will usually include the following information:

- a. The name of the person who has referred the case.
- b. The date and time when the case was referred.
- c. The name of the person who has referred the case.
- d. The name of the person who has referred the case.
- e. The name of the person who has referred the case.
- f. The name of the person who has referred the case.
- g. The name of the person who has referred the case.
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- v. The name of the person who has referred the case.
- w. The name of the person who has referred the case.
- x. The name of the person who has referred the case.
- y. The name of the person who has referred the case.
- z. The name of the person who has referred the case.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

in the above entitled case, your letter was duly received and
replied to.

"1. That during the Christmas holidays in December, A.D. 1953, while living with his wife, Marjorie M. Sikkema, in the Village of Lombard, County of Du Page and State of Illinois, the said Marjorie M. Sikkema advised him that she was going to get a divorce.

"2. That your petitioner had just returned for the Holidays from the United States Navy on a temporary leave and that when his wife informed him of such intention he was so emotionally upset that he did not know what to do and that at the suggestion of his said wife, your petitioner did authorize an attorney to file an answer on his behalf in a complaint for divorce to be filed.

"3. That on the 28th day of December, A.D. 1953, the Complaint in the above entitled case was filed in the Office of the Circuit Clerk of Du Page County; and that on the 29th day of December, A.D. 1953, an answer was filed on behalf of the petitioner by Warren K. Henning, his attorney.

"4. That subsequent to the filing of said answer that a stipulation was entered into by and between the attorneys for the parties hereto stipulating that the cause might go to immediate trial.

"5. That in the trial of said cause the plaintiff did testify that the defendant had deserted her, the said plaintiff, on the 1st day of December, A.D. 1952, and that the said plaintiff and defendant had not lived together subsequent thereto up to the day of the filing of the Complaint herein.

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"7. Your petitioner further represents to this Court that contrary to the testimony of the plaintiff and supporting witness, that the plaintiff and defendant did live as husband and wife from the 10th day of September, A.D. 1951, to the 11th day of September, A.D. 1952, in Quarters 560 and Quarters 70B at Great Lakes, Illinois; and that the plaintiff and defendant did live together as husband and wife in the Village of Lombard, County of Du Page and State of Illinois, from the 17th day of December, A.D. 1952, until the 26th day of December, A.D. 1953.

"YOUR PETITIONER FURTHER PRAYS that upon the vacating of said Decree that the case be set down for retrial upon the Complaint and Answer heretofore filed herein."

"State of Illinois)
County of Du Page) ss.

Edgar J. Elliott."

1. That the business of the defendant was

conducted in a lawful manner.

2. That the defendant was not engaged in

any business that would be in violation of the laws

of the State of Illinois, or of the United States.

3. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

4. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

5. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

6. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

7. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

8. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

9. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

10. That the defendant was not engaged in any

business that would be in violation of the laws

of the State of Illinois, or of the United States.

11. That the defendant was not engaged in any

business that would be in violation of the laws

Counsel for appellant states that the facts set forth in the petition to vacate, which were admitted to be true by the motion of appellee to strike, show clearly that the decree was based upon testimony which was untrue and that the parties were in collusion and committed a fraud upon the trial court. Counsel insists that notwithstanding appellant was in pari delicto with respect to this collusion and fraud and does not come into court with clean hands, the public is an interested party in all divorce suits and occupies the position of a third party; that the conscience of the court alone must protect this interest, which includes the interest of the minor children, whose custody was awarded to appellee. In support of this contention, counsel cite *Ollman v. Ollman*, 396 Ill. 176, where it is said (P. 181-2) that the state, as the sovereign, has an interest in maintaining the integrity and permanency of the marriage relation and that a decree of divorce affects the children of the parties and, in a general way, in a greater or lesser degree, the welfare of every citizen and that the public is represented by the conscience of the court. In the recent case of *Nusser v. Nusser*, 4 Ill. App. 2d, 538, 124 N. E. 2d, 549, the *Ollman* Case is cited and the court goes on to observe that divorce vitally concerns the minor children of the divorced couple, the home life and domestic relations of the people, the public morals, the prevailing system of the social order and the welfare of every citizen; that these interests are not represented by either of the parties to the proceeding, but are left to the protection of the court, as the representative of the state and that in a proper case, the court may refuse to grant a decree though the grounds of such refusal be outside the issues made by the pleadings of the parties.

Counsel also quotes from 1 Black on Judgments (2d Ed.) 489, Sec. 320-321, to the effect that courts will generally hear motions to vacate divorce judgments on the same grounds and conditions as any other judgments. This authority then continues: "Where a decree for divorce has been obtained by fraud or deceit, as where the complainant has practiced fraud or trickery to prevent the defendant from having notice of the suit, or from appearing in the action, or from answering and defending the same, the innocent party, thus deceived, may undoubtedly obtain the opening or vacating of the decree, by making a timely and proper application and showing good cause."

In the instant case the party making the application to vacate the decree is not an innocent party, nor was he in any way deceived. He, acting through an attorney of his own choosing, entered his appearance in the original proceeding and he, himself, signed his answer to his wife's complaint for divorce. Previously he had executed a property settlement and upon the filing of the complaint, he stipulated that the case could be heard at once. He has had his day in court. He was not prevented from making any defense he desired to interpose and the terms of the decree, which he was instrumental in procuring, were the terms which he, himself, desired.

The essential allegations of the petition upon which appellant seeks the vacation of the original decree were that upon the trial of this cause, appellee and a corroborating witness testified that defendant deserted appellee on December 1, 1952, and that she had not lived with her husband subsequent to that time. The petition to vacate states that this testimony was not true and that the plaintiff and defendant had lived together as husband and wife in Du Page County from December 17, 1952, to December 26, 1953. The decree, sought to be set aside,

[illegible]

was granted on December 28, 1953, and filed and approved on January 25, 1954. The original petition of appellant to vacate this decree was lodged with the clerk of the Circuit Court and filed by him on February 24, 1954. No notice to appellee or her counsel of the filing of this petition had been given and it was not until April 30, 1954, that a verification by the attorney now representing appellant was added. Our Practice Act provides that the trial court may, within thirty days after the entry of any decree, set the same aside upon good cause shown by affidavit. (Ill. Rev. St. Chap. 110, Sub-par. 7, Sec. 50) Treating the application however as properly verified and filed within thirty days after the approval of the decree, we do not think the chancellor abused his discretion in denying it. No court should countenance a party to enter into an agreement in regard to the provisions of a divorce decree and, after receiving the benefits to be derived therefrom, permit him to repudiate such decree. (Kuebler v. Kuebler, 204 Ill. App. 256; Boylan v. Boylan, 349 Ill. 471; Buck v. Buck, 337 Ill. App. 520.)

Tobias v. Tobias, 208 Ill. App. 539 was a proceeding in equity in the Circuit Court of Peoria County to set aside and vacate a divorce decree theretofore granted by that court on the grounds that the court lacked jurisdiction and that the decree was obtained by false testimony. In holding that Courts of Equity would not set aside a decree upon the ground that it was obtained by false evidence this court said: "Courts of Equity will not set aside a decree upon the ground that it was obtained by false evidence, but only for fraud which gives a court colorable jurisdiction over the defense presented. Evans v. Woodsworth, 213 Ill. 404, and cases there cited; Graves v. Graves (Iowa), 10 L.R.A. (N. S.) 216; and Bleakley v. Barclay (Kan.), page 230 of

the same volume, and a note in said volume extending from page 230 to page 243. As it appears here that the divorce suit was brought in the proper county and that there was due and proper service, we are of the opinion that the court below had no power in this proceeding to vacate the decree of divorce on the ground that the evidence by which it was obtained was false."

It is true, as suggested by counsel for appellant, that the state does have an interest in maintaining the integrity and permanency of the marriage relation and many divorces may be granted upon perjured testimony. We have considered the authorities upon which counsel for appellant rely, and our conclusion is not at variance with any of them. The trial court had jurisdiction of the parties and the subject matter of this proceeding. The evidence offered upon the original hearing was sufficient to warrant the decree which the chancellor awarded. Assuming that the evidence heard by the court was false, appellant, upon this record, under all the authorities, is in no position to procure the vacation of that decree.

The order of the Circuit Court of D. Page County is affirmed.

Order affirmed.

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HEDWIG LIPSKI,
Appellant,
v.
ARTHUR SCHWARTZ,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION
OF THE COURT.

This is an appeal from an order of the Circuit Court
of Cook County entering judgment for the defendant on the
pleadings, dismissing the cause and ordering the plaintiff
to go hence without day, and also from an order denying a
motion subsequently made to vacate the said judgment, denying
plaintiff leave to file a reply to the answer of the defend-
ant, and denying leave to amend the complaint by adding an
additional count.

The plaintiff's theory of the case is that the court
was in error in entertaining defendant's motion for judgment
on the pleadings, and that it erred, in that, in the hearing
on the motion it considered both the amended complaint and
the answer thereto. The plaintiff contends further that even
if the motion was properly entertained, the court erred in
entering judgment on the pleadings, since included in the
original amended complaint were actions for false imprison-
ment and malpractice, as well as an action for malicious
prosecution, to which first two causes of action no defense
was pleaded. The plaintiff also contends that the court
abused its discretion in refusing to vacate its judgment and

to permit the plaintiff to file an amendment to the amended complaint and a reply to the defendant's answer.

The suit was commenced December 27, 1950. The complaint first filed on the part of the plaintiff was dismissed on the defendant's motion. Plaintiff was granted leave to file an amended complaint. The amended complaint (hereafter referred to as the complaint) was filed December 19, 1951 and is the only complaint which is before the court for the purposes of this appeal. It is in one count, and is prolix and rambling. The allegations therein which are essential for an understanding of the issue before this court are that the defendant, maliciously intending to injure the plaintiff in her good name, fame and credit and to cause her humiliation and suffering, conspired with two police officers and arranged to have them forcibly take the plaintiff from the defendant's office without a warrant on January 8, 1949; that thereafter the defendant filed a criminal complaint in which he falsely alleged that the plaintiff had created a breach of the peace, upon which complaint a warrant was issued by a judge of the Municipal Court of Chicago; that the plaintiff was immediately placed on trial, found guilty and incarcerated; that afterwards a new trial was granted to the plaintiff and she was discharged; that because of the conduct of the defendant and because of his treatment of the plaintiff she was in a highly nervous state and distracted.

The complaint further alleges that the defendant,

for the purpose of humiliating and injuring the plaintiff, by false accusations caused the plaintiff to be sent to the Psychopathic Hospital; that subsequently, on January 10, 1949, the defendant, without probable cause and for the sole purpose of maliciously injuring the plaintiff, signed a sworn petition in the County Court of Cook County asking that the plaintiff be adjudged a mentally ill person, alleging that the plaintiff was in such condition of mind and body as to render her remaining at large dangerous to the defendant or to others, that emergency admission to a hospital for the mentally ill was necessary for the protection of defendant and others, and further alleging in the petition that a diligent search had been made to learn the names and addresses of the relatives of the plaintiff and that he, the defendant, was the physician and such nearest relative.

It is also alleged in the complaint that the defendant knew at the time he filed the petition that the plaintiff had a sister living in Minneapolis, Minnesota; that he then knew that he, the defendant, was not a relative of the plaintiff; that because of the aforesaid action of the defendant, the defendant was able to have the plaintiff imprisoned and kept in prison for a long time; that plaintiff was never asked to appear before any judge or tribunal, and that because of defendant's standing in the medical profession he was able to have the plaintiff adjudged to be a person suffering from schizophrenic psychosis paranoid; that the plaintiff was then placed in the custody of her sister who took her to

Minneapolis, Minnesota; that the plaintiff was subsequently given proper medical treatment and was told by various physicians that she was not at any time suffering from mental disease, and after her arrival in Minneapolis she obtained employment as a secretary and has been so employed except at such times when she was required to have medical attention; that all the statements made by the defendant in the said petition were false; that subsequently the County Court of Cook County found the plaintiff a person not mentally ill; that the defendant, a licensed physician who has been in practice for a long time in the state of Illinois, had filed the complaint in the Municipal Court of Chicago and signed the petition filed in the County Court of Cook County for the sole purpose of removing the plaintiff from the City of Chicago and to sever the professional relationship with her; that he knew at the time that she had not committed a criminal offense and that she was not mentally unsound but was merely in a very nervous state due to his treatment of her.

On December 28, 1951 a motion to dismiss the amended complaint was filed by the defendant on the grounds that the complaint failed to allege that the defendant lacked probable cause in making the disorderly conduct charge against the plaintiff inasmuch as the plaintiff in the trial was originally found guilty, that the complaint failed to allege that the final determination of the proceedings in the County Court of Cook County was favorable to the plaintiff, and that it failed to allege that the defendant's signing and filing of the

complaint in the Municipal Court of Chicago were without probable cause. This motion was denied.

Thereupon, on March 19, 1952, the defendant filed an answer to the complaint, in which he admits that on January 8, 1949 he filed a complaint in the Municipal Court of Chicago charging the plaintiff with a breach of the peace, but he denies that in filing such complaint he had intended to injure the plaintiff in her good name or otherwise, or that he was motivated by malice. He says that a warrant was issued out of the Municipal Court of Chicago and that the plaintiff on January 8, 1949 was taken into custody by two police officers, and denies that he connived or conspired with those officers, or any other officers, to have the plaintiff forcibly removed and taken to a police station. He states that the charge was continued to January 20, 1949 when the plaintiff was found guilty and fined \$1.00 and costs; that in August of 1951 an order was entered by a judge of the Municipal Court, which order is as follows:

"ORDER

"This matter coming on to be heard on defendant's motion for a new trial, the court having heard argument of counsel and being fully advised in the premises,

"And the court finding that the defendant committed the offense charged in the complaint but that at the time of the said offense defendant was insane.

"It Is Hereby Ordered:

"The motion for a new trial is granted.

"On new trial, it being stipulated that all the evidence heard at the previous trial be reintroduced at

THE HISTORY OF THE

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FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME

BY JAMES OSGOOD, ESQ.

OF THE BUREAU OF THE LAND OFFICE

AND

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IN THE DEPARTMENT OF THE INTERIOR

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the new trial and constitute part of the record thereof as though actually heard at said trial.

"The court having considered all the evidence and being fully advised in the premises,

"It Is Hereby Ordered:

"The defendant is discharged because of insanity at the time of the offense committed."

The defendant admits that he is an experienced physician, but denies that he in any respect took advantage of plaintiff's mental and physical condition or that he made false accusations in the complaint filed in the Municipal Court. He states that he signed the complaint because the plaintiff was guilty of repeated disorderly conduct and breaches of the peace in that she had for a long time prior to and continuously up to January 8, 1949 created disturbances in and about his office and molested the defendant in numerous ways and on numerous occasions. He denies that he caused the plaintiff to be sent to the Psychopathic Hospital, but states that on January 10, 1949 the judge of the Municipal Court requested the Psychiatric Institute of the Municipal Court of Chicago to examine the plaintiff, and that upon such examination the Director of the Institute tentatively diagnosed the plaintiff as suffering from a paranoid condition. The defendant admits that plaintiff was in a highly nervous state, distracted, and unable properly to protect her interests, but he further says that these symptoms were indicative of plaintiff's mental illness as found by the Psychiatric Institute and by the commission of physicians appointed by the County Court of

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Cook County.

The defendant admits that he signed and filed a petition under oath in the County Court of Cook County containing the statements alleged by the plaintiff, but he denies that he signed such petition without probable cause or for the sole purpose of maliciously injuring the plaintiff. He admits that he signed the petition as the physician and nearest relative, but he denies that at that time he knew the plaintiff had a sister residing in Minneapolis. He states that the plaintiff had been a patient of his for many years and that he properly regarded himself as her physician. He asserts that the petition signed by him was set for hearing January 17, 1949 in the County Court of Cook County; that the court appointed a commission of physicians to examine the plaintiff and to report to the court; that the physicians did examine the plaintiff and reported to the court that she was a person suffering from schizophrenic psychosis, paranoid, and found that she was a mentally ill person incapable of managing and caring for her own estate and recommended that she be committed to a mental hospital; that on the same date the County Court of Cook County found the plaintiff was a mentally ill person and ordered that the plaintiff be committed to the care and custody of her sister. The defendant denies that he took advantage of the plaintiff's helplessness and denies that he had the plaintiff imprisoned and kept in prison for a long time, and denies that the plaintiff was never summoned to appear before any judge, court or tribunal. He

neither admits nor denies the allegations in the complaint as to the actions of the plaintiff after she went to Minneapolis. He states that he knew the plaintiff was suffering from a paranoid condition and was in need of medical treatment, that she was a danger to the defendant or to other persons, and that with such knowledge he, as a licensed physician, took such steps as his duty required and the law permitted.

The defendant further denies that he filed the complaint in the Municipal Court and that he signed the petition in the County Court of Cook County for the sole purpose of removing the plaintiff from the City of Chicago or of severing any personal relationship with her, or that such actions were motivated by any improper motives. He states that the plaintiff had been a patient of his since 1934 and that following his return from the army in 1946 the plaintiff visited, telephoned and wrote the defendant on numerous occasions attempting to establish a relationship other than a professional one, over the protest of the defendant; that the plaintiff had on numerous occasions made demands on the defendant for substantial sums of money and had threatened him with legal and other consequences if he failed to comply with such requests, and that the plaintiff created numerous disturbances in the defendant's office and threatened to continue to do so. He denies that any ailments suffered by the plaintiff are in any respect due directly or indirectly to the conduct of the defendant.

The defendant further states that prior to his signing

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and filing the complaint for disorderly conduct a conference was held with representatives of the state's attorney's office, the plaintiff and defendant being present, at which time the plaintiff was advised by such representatives that she should cease molesting or disturbing the defendant, and the defendant was advised that if she did not do so he should sign a complaint alleging disorderly conduct on the part of the plaintiff.

On October 21, 1953 the defendant filed a motion for judgment on the pleadings. In support of such motion the defendant showed that no reply had been filed to the answer of the defendant and that on the basis of the complaint and answer certain facts must be taken as established for the purpose of this motion. The facts as set forth in the motion are practically the same as those set forth in the answer, and the defendant prayed for judgment under provisions of section 45 of the Civil Practice Act (Ill. Rev. Stat. chap. 110, par. 169) and for dismissal of the action.

On April 22, 1953 the plaintiff filed a reply to the defendant's motion, in which she alleged that the same matters set forth in the petition were involved in a motion to dismiss theretofore filed by the defendant, which motion was overruled by the court; that there was no new matter alleged in the answer requiring a reply, and that the amended complaint sets up a cause of action.

On October 22, 1953 the trial court entered an order, which, after reciting that the pleadings disclose that as a

matter of law plaintiff is entitled to no relief, ordered that judgment be entered for the defendant and against the plaintiff, that the cause be dismissed, and that the plaintiff go hence without day.

On November 20, 1953 the plaintiff filed a motion to vacate, which was entered and continued to December 28, 1953. On January 27, 1954 a notice was filed which recited that the attorney for the plaintiff would appear before the trial judge and "then and there present the written motion of the undersigned * * * a copy of which, together with copy of substitution of attorneys, and copy of reply to answer to amended complaint and Count II to amended complaint, are herewith served upon you." Neither the reply to the answer, nor count II of the amended complaint anywhere appear in the record. On January 27th there was also filed in the court a motion and affidavit of the substituted attorney for the plaintiff in which the affiant alleges that on the basis of his knowledge of the facts and the law the plaintiff was unlawfully deprived of her freedom and falsely detained and imprisoned in the Cook County Psychopathic Hospital for the period January 10, 1949 to January 17, 1949 by reason of proceedings initiated, instigated and promulgated by the defendant; that plaintiff was on January 10, 1949 taken by force against her will and without her consent to the Cook County Psychopathic Hospital; that at the time she was so taken to the hospital no writ or order was issued by the County Court of Cook County directed to the sheriff or proper police officer authorizing such officer to take charge

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of plaintiff as required by law, being the Mental Health Act of 1945, which was in effect at such time; that it appears from the law as decided in the case of Crawford v. Brown, 321 Ill. 305, that the plaintiff is entitled to a judicial determination as to whether her condition at the time of her detention at the Psychopathic Hospital was such as to endanger the safety of herself or the safety of the public; that by reason of such unlawful detention the plaintiff has a good and valid claim against the defendant which is well founded in law. The affiant further states that "unless plaintiff is granted an opportunity in this proceeding to file her reply and her additional complaint she will have no recourse whatsoever since in affiant's opinion, the Statute of Limitations has run. Affiant makes this affidavit for the purpose of inducing the Circuit Court of Cook County to vacate the order entered on October 21, 1953, which dismissed plaintiff's amended complaint and to enter an order granting plaintiff leave to file her reply and additional complaint instanter."

On January 27, 1954 the trial court, after hearing counsel, entered an order (1) granting plaintiff leave to substitute attorneys instanter; (2) denying plaintiff's motion to vacate the judgment of October 21, 1953 (entered October 22, 1953), denying plaintiff's motion for leave to file a reply to the defendant's answer to the amended complaint, and denying plaintiff's motion to file an amendment, namely, count II, to the amended complaint; and (3) granting plaintiff leave to file the affidavit of her substituted attorney in

support of the motion to vacate the judgment.

The plaintiff filed a notice of appeal in which she appeals from the order of the trial court of January 27, 1954 and also from the judgment and order entered on October 22, 1953.

The plaintiff argues vigorously that the court erred in entertaining defendant's motion for judgment on the pleadings. She argues that the motion is in the nature of a general demurrer and that the defendant, having filed his answer to the complaint, would be placed in the inconsistent position of answering and demurring at the same time. The plaintiff relies principally on Lederer v. St. Clair Hotel, 339 Ill. App. 214. In that case the trial court dismissed the cause on an oral motion for judgment on the pleadings. The oral motion did not point out the defects complained of. It went only to the sufficiency of the complaint. In its opinion the court says that since the defendant had withdrawn his previously filed written motion to dismiss the complaint and had subsequently filed an answer thereto, it had confessed that the pleadings were sufficient to require an answer and that by so pleading over it had waived its demurrer. The court also bases its opinion upon the fact that the motion was made without complying with section 45 of the Practice Act in that it did not state the nature of the defects complained of. In this case the court treats a motion for judgment on the pleadings as a motion to strike the complaint for insufficiency.



The plaintiff also cites a number of cases under the former Practice Act to the effect that once the complaint is pleaded to a demurrer would not lie without a withdrawal of the pleas. These cases are not applicable to the issue before us. The plaintiff misapprehends the true nature of a motion for judgment on the pleadings. Such a motion is of common law origin, and the right to enter judgment on the pleadings is inherent in every court of record when the facts shown and admitted by the pleadings entitle a party to such judgment. 71 C.J.S. Pleading §424; 41 Am. Jur. Pleading §335. The motion is in the nature of a demurrer, but it does not carry with it all the incidents which apply to a demurrer, nor is it equivalent to a demurrer. It raises the question as to whether there is any issue of material fact presented by the pleadings, and if there is no such issue, the question as to which party is entitled to judgment. The right to entertain the motion was not given by section 45 of the Practice Act. The requirements as to form set out in section 45, however, are applicable to such a motion. The motion may be, and generally is, made after the issues are settled by the pleadings. Under such a motion the court has a right to consider both the complaint and the answer. In Milanko v. Jensen, 404 Ill. 261, the court says:

"Plaintiffs made a motion for judgment on the pleadings * * *.

"The motion for judgment raised the sufficiency of the pleadings, as a matter of law, to entitle the plaintiffs to the relief sought by their complaint and as to whether defendants' answer set up such a defense to the complaint as to entitle defendants to a hearing on the merits. (Harrison v. Kamp, 395 Ill. 11.)"

See also General American Steel and Tube Company, Inc. v. American Electric Fusion Corporation, 323 Ill. App. 294; Brown v. Gill, 343 Ill. App. 460; Sanborn v. Blankenheim, 346 Ill. App. 214; Beach v. Boettcher, 323 Ill. App. 79, 83; A. E. Handschy Co. v. Rowen Litho Press, Inc., 348 Ill. App. 187.

The plaintiff also contends that even if the court could have properly entertained the motion for judgment on the pleadings, the court erred in entering such judgment inasmuch as the complaint, as she contends, sets forth actions for false imprisonment and malpractice, as well as an action for malicious prosecution, and that the matter contained in the answer did not adequately set forth a defense to the first two causes of action. It is apparent from the record that the plaintiff, the defendant, and the trial court, on the hearing of the motion, considered the action solely one for malicious prosecution. The complaint, which is in one count, sets forth the elements of an action for malicious prosecution. It is apparent that all the proceedings with reference to the plaintiff emanated from the original arrest. The complaint alleges that the defendant "by false accusations, well knowing the plaintiff was not guilty of the offense charged in the criminal complaint, * * * caused the plaintiff to be sent to the Psychopathic Hospital." Even if it could be considered that the proceedings in having the plaintiff brought before the County Court are separate and apart from the original arrest, the charge still is a charge of malicious prosecution,

and it is admitted in the complaint that the proceedings before the County Court did not terminate in favor of the plaintiff. After a careful reading of the complaint, giving it the most liberal construction possible, we find the complaint sets forth an action for malicious prosecution only.

In order to succeed in an action for malicious prosecution certain elements must be pleaded and proved, as the court points out in Shelton v. Barry, 328 Ill. App. 497:

"In general, to authorize the maintenance of an action for malicious prosecution, the following elements must be shown: (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and (6) the suffering of injury or damage as a result of the action or prosecution complained of. An action for malicious prosecution is not favored in the law. Shedd v. Patterson, 302 Ill. 355, 359."

In her complaint the plaintiff alleges that the plaintiff was found guilty of the offense charged and was thereafter granted a new trial and discharged. In his answer the defendant sets forth in full the order of the court granting the new trial and discharging the plaintiff, in which order the court finds that the plaintiff committed the offense charged in the complaint but at the time of the offense the plaintiff was insane, and because of such insanity discharged the plaintiff. This is matter which was not brought out in the complaint. Standing uncontradicted it is determinative of plaintiff's cause of action. That such an order was entered is nowhere denied, and is admitted by the plaintiff in her briefs filed in this court. In his uncontradicted answer the defendant sets out that on January 10, 1949 a judge of the Municipal

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1. *Journal of the American Medical Association*, 1964; 191: 1000-1001.

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Johnston not satisfied with the findings

Journal of Management Education 30(6)

1. The first step is to identify the problem. This involves understanding the current situation and what needs to be changed.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

the 1990s, the number of people in the United States who are 65 years of age or older is projected to increase from 20 million to 30 million, and the number of people 75 years of age or older is projected to increase from 10 million to 15 million (U.S. Census Bureau, 1996). The number of people 85 years of age or older is projected to increase from 2 million to 4 million (U.S. Census Bureau, 1996). The number of people 90 years of age or older is projected to increase from 500,000 to 1 million (U.S. Census Bureau, 1996). The number of people 95 years of age or older is projected to increase from 100,000 to 200,000 (U.S. Census Bureau, 1996). The number of people 100 years of age or older is projected to increase from 10,000 to 20,000 (U.S. Census Bureau, 1996).

1. The first group of variables, *demographics*, includes age, sex, and marital status. The second group, *education*, includes years of schooling, high school graduation, and college graduation. The third group, *employment*, includes employment status, occupation, and industry. The fourth group, *income*, includes household income and personal income. The fifth group, *housing*, includes home ownership, home value, and home age. The sixth group, *transportation*, includes car ownership and car age. The seventh group, *health*, includes health status and health insurance. The eighth group, *social*, includes social network and social support. The ninth group, *psychological*, includes psychological well-being and psychological distress. The tenth group, *behavioral*, includes lifestyle and health behaviors. The eleventh group, *environmental*, includes environmental quality and environmental exposure. The twelfth group, *policy*, includes policy implementation and policy evaluation. The thirteenth group, *research*, includes research design and research findings. The fourteenth group, *practice*, includes practice implementation and practice evaluation. The fifteenth group, *theory*, includes theory development and theory testing. The sixteenth group, *methodology*, includes methodology development and methodology testing. The seventeenth group, *statistics*, includes statistical analysis and statistical interpretation. The eighteenth group, *communication*, includes communication development and communication testing. The nineteenth group, *evaluation*, includes evaluation development and evaluation testing. The twentieth group, *innovation*, includes innovation development and innovation testing.

Journal of Management Studies, 19(6), 701-718.

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• *1978* *Journal of the American Statistical Association* 73: 100-105

* If not lower, still at 1000 ft.

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Journal of Management Studies, 19(1), 67-80.

Court requested an examination of the plaintiff by the Psychiatric Institute, which made a report tentatively diagnosing the plaintiff as suffering from a paranoid condition. Thereupon the plaintiff was sent to the Psychopathic Hospital, the defendant signing a sworn petition to bring the matter before the County Court of Cook County. Plaintiff argues that at the time she was taken to the Psychopathic Hospital no writ or order was issued by the County Court of Cook County. However, she was taken there following the tentative diagnosis of the Psychiatric Institute of the Municipal Court. It is admitted that an adjudication was entered in the case by the County Court that the plaintiff was a person who was mentally ill. It is presumed that the action of the County Court was regular. Moats v. Moore, 199 Ill. App. 270.

Under the pleadings it is evident that none of the proceedings against the plaintiff terminated in her favor. This would constitute a complete bar to the action of the plaintiff. The court's ruling on defendant's motion for judgment on the pleadings was proper.

At the time the judgment was entered no motion was made to file amended pleadings. Subsequently, within 30 days, a motion was filed by the plaintiff to vacate the judgment of the court and to permit the plaintiff to file a reply to defendant's answer and also to file an amendment, count II, to the plaintiff's complaint. Plaintiff contends that the court, in refusing to vacate the judgment in order to allow

the plaintiff to file an amendment to the complaint, was in error. "The right to plead de novo has always rested in the discretion of the trial court, and it certainly cannot be reversed except on showing the grossest abuse." Hackman v. City of Staunton et al., 190 Ill. App. 545. In order to determine whether the motion of the plaintiff to vacate the judgment should be allowed in order to permit the filing of a reply and an amendment to the complaint, an examination of both the amendment to the complaint and the reply to the answer was necessary. It must be presumed that the trial court did examine them. Neither the reply to the answer nor the amendment to the complaint offered by the plaintiff appears in the record. On the record the exercise of the discretion of the trial court is not before us for review. McCord v. Crooker, 83 Ill. 556; Kilian v. Frazier, 4 Ill. App. 2d 108.

The judgment and order of the trial court entered October 22, 1953 and the order of January 27, 1954 are affirmed.

Judgment and order affirmed.

Robson and Schwartz, JJ., concur.

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| Defendant in Error, |) | ERROR TO MUNICIPAL |
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| v. |) | COURT OF CHICAGO. |
| |) | |
| CHESTER MATU, |) | |
| Plaintiff in Error. |) | |

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The defendant was tried in the Municipal Court of Chicago on a charge of contributing to the delinquency of a minor. A jury returned a verdict finding him guilty and he was, after a motion for new trial was overruled, sentenced to the county jail for six months and fined \$100. Defendant prosecutes this writ of error to review the conviction, urging as grounds for reversal that he was not proved guilty beyond a reasonable doubt and that the verdict was a result of passion and prejudice on the part of the jury.

It appears from the evidence that at the time of the trial the defendant was sixty-four years old. He owned a two-story dwelling house located in the City of Chicago, which he rented to a family by the name of Dukstein, who occupied the entire first floor and two rooms on the second floor. The defendant retained for his own use two rooms and a bathroom on the second floor. He had been employed for thirty-three years as a carpenter by the Chicago Transit Authority. He had two married daughters, had been divorced, and at the time in question was living alone. The Duksteins have two children, a girl, Kathleen, aged four, and a boy two years old.

IN THE CIRCUIT COURT OF THE JUDICIAL DISTRICT OF ILLINOIS,
 IN AND FOR THE COUNTY OF CHICAGO,
 Defendant in Error,
 v.
 Plaintiff in Error.
 No. 10,000.

The defendant was tried in the Municipal Court of Chicago on a charge of obstructing the defendant's attorney, a jury returned a verdict finding him guilty and sentencing him to a term of one year and a fine of \$100.00. Defendant appealed from this verdict and judgment to the Circuit Court of Cook County, Illinois, and was tried and convicted there. Defendant appeals from this verdict and judgment to the Circuit Court of Cook County, Illinois, and asks that the same be reversed and that he be acquitted.

The record in this case shows that the defendant was arrested on a charge of obstructing the defendant's attorney, a jury returned a verdict finding him guilty and sentencing him to a term of one year and a fine of \$100.00. Defendant appealed from this verdict and judgment to the Circuit Court of Cook County, Illinois, and was tried and convicted there. Defendant appeals from this verdict and judgment to the Circuit Court of Cook County, Illinois, and asks that the same be reversed and that he be acquitted.

The record in this case shows that the defendant was arrested on a charge of obstructing the defendant's attorney, a jury returned a verdict finding him guilty and sentencing him to a term of one year and a fine of \$100.00. Defendant appealed from this verdict and judgment to the Circuit Court of Cook County, Illinois, and was tried and convicted there. Defendant appeals from this verdict and judgment to the Circuit Court of Cook County, Illinois, and asks that the same be reversed and that he be acquitted.

On the 26th of December, 1953, the Duksteins were visited by a family named Gnoth. Mrs. Gnoth signed the complaint in the case before us. The Gnoth family consisted of the father and mother, a seven year old girl and a three old boy.

The only witnesses who testified for the State as to what took place that day at the Dukstein home were the seven year old Gnoth girl and Mrs. Dukstein.

The relations between the defendant and both the Dukstein and Gnoth families were friendly. The families, both adults and children, made free of the defendant's rooms. On December 26th, sometime in the afternoon, the defendant asked the four children to come to his rooms, where he gave them pop and potato chips. The children then went downstairs, and later again went upstairs to the room of the defendant, at which time he allegedly committed the revolting acts, which it is not necessary to detail. These acts involved all four of the children. Immediately upon her coming downstairs, the seven year old Gnoth girl told her mother of the conduct of the defendant. After this conversation, the defendant, who had left the house, returned in an intoxicated condition and was unable to go upstairs. He was helped up by Mr. Dukstein and Mr. Gnoth, and the defendant then invited them into his room to have a drink.

On December 29th an information signed by Mrs. Gnoth was filed in the Municipal Court of Chicago.

On Christmas Day Mrs. Dukstein had given the defendant

On the 10th of November, 1937, the 1937 census was taken for a family named Smith. Mrs. Smith stated that the family consisted of the father, mother, a seven year old girl and a three year old boy.

The only witnesses who testified for the State as to what took place that night at the Smith home were the seven year old girl and the mother.

The testimony of the mother and both the father and the seven year old girl was that the father had been drinking and was very intoxicated at the time of the incident.

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a plate of food. On Monday, presumably December 27th, the defendant returned the plate to her, and at that time asked her if she would call Mrs. Gnoth and tell her he "was sorry." A police officer testified that on December 27th, on the complaint of Mrs. Gnoth, he took the defendant to the station. It is not clear from the record whether the conversation with Mrs. Dukstein took place before or after the time the defendant had been contacted by the police.

During the trial the State attempted to qualify Kathleen Dukstein, aged four, as a witness. She was examined, both by the state's attorney and by the court, in the presence of the jury. The court, after the examination, refused to permit her to testify.

The police officer testified that at the time he interviewed the defendant the latter admitted that the children were in his room on the day in question, but denied the conduct attributed to him. Defendant persisted in such denial in his testimony at the trial.

Mrs. Gnoth was called as a witness by the State, and only testified to the names and ages of her children. Mrs. Dukstein and the defendant testified that after the incident in question and up to the present time she (Mrs. Dukstein), her husband and their children visit back and forth with the defendant but that since December 26th the children are not permitted in his room alone.

The defendant contends that the testimony of the seven year old child was not corroborated and that under all

a place of fact. On Monday, presumably December 27th, the defendant returned the place to her, and at that time asked her if she would tell him. Green and Bell had no "business". A police officer testified that on December 27th, on the suggestion of Mrs. Green, he took the defendant to the station. It is not clear from the record whether the conversation with Mrs. Green took place before or after the time the defendant had been arrested by the police.

During the trial the State displayed no quality. William Dubois, 4000 10th, at a witness. She was examined both by the State's attorney and by the defense. The presence of the jury. The State, through the examination, testified that it was not guilty.

The police officer testified that at the time the defendant was arrested, she was in the company of a man who was not named. The defendant testified that she was in the company of a man who was not named. The defendant testified that she was in the company of a man who was not named. The defendant testified that she was in the company of a man who was not named.

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the circumstances disclosed in the record the evidence was not so clear and convincing as to substantiate the jury's verdict. The State, on the other hand, argues that her testimony was corroborated by the statement made by the defendant to Mrs. Dukstein requesting her to tell Mrs. Gnoth that he was sorry, as well as by the other facts and circumstances revealed in the evidence.

Concerning crimes of this character, the Supreme Court, in People v. Williams, 414 Ill. 414, has said:

"The conviction of the defendant was for the crime of taking indecent liberties with a minor child. This court, in considering a case of like character, People v. Watkins, 405 Ill. 454, used the following language: 'An indecent liberties case is similar in character to that of rape, because it is an accusation easily made, hard to be proved, and harder to be defended by the party accused, though ever so innocent. (People v. Phipps, 338 Ill. 373.) We have always safeguarded the interests of an accused where the testimony is uncorroborated, by requiring that it should be clear and convincing.'

"In the case of People v. Crowe, 390 Ill. 294, the court stated that when the conviction of the defendant rests or is based upon the testimony of a child of tender years, in order to sustain a judgment of guilt that evidence must be corroborated or be otherwise clear and convincing. In People v. Pazell, 399 Ill. 462, this court said that, 'Where a conviction of taking indecent liberties with a child depends upon the testimony of the prosecuting witness, and the defendant denies the charge, there must be substantial corroboration of the prosecuting witness by some other evidence, fact or circumstances in the case. People v. Martin, 380 Ill. 328.'"

No objection was made by the defense to the introduction of the alleged admission made by the defendant when he stated that Mrs. Dukstein should tell Mrs. Gnoth he was sorry. Undoubtedly the evidence was properly admitted, but in our opinion, treating it as an admission on the part of the

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The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Prisons, and the United States Department of Justice, regarding the activities of the Central Intelligence Agency (CIA) and the Central Intelligence Agency (CIA) in the United States and abroad.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the purpose of subverting the Government of the United States.

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defendant, it is of little corroborative weight. It is too general and can be interpreted in too many ways.

The trial court permitted the examination on the voir dire of the four year old child. While the method of the examination is within the discretion of the trial court, we feel that it would be better to follow the usual rule applying to voir dire examinations with reference to confessions, and examine the child out of the presence of the jury.

Wigmore on Evidence (Third Ed.), Vol. 6, Sec. 1820, n. 2.

In a case of this character the mere parading before the jury of the four and one-half^{year}/old child, whom the trial court ruled incompetent to testify, might have been prejudicial to the defendant.

We also note that the trial court reserved its ruling on defendant's motion for a directed verdict made at the close of the State's evidence. The court is given the right to reserve ~~its~~ ruling on a directed verdict at the close of the plaintiff's evidence only by the Civil Practice Act. The Practice Act by its terms does not apply to criminal cases, and so such reservation was improper. Ill. Rev. Stat., Chap. 110, Par. 125.

The evidence in the record, that after the story of the children had been told downstairs to their parents the two men--the fathers--tenderly helped the defendant to his room and were invited in for a drink, is not in accord with what would seem to us to be the reactions of normal men to like circumstances, nor is the further evidence of Mrs. Dukstein that

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a genuine organization or a front organization for the Soviet Union.

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she and her husband remain on a friendly footing with the defendant to the present day and that they and their children visit him in his room. If the testimony of the seven year old girl as to the revolting and disgusting conduct of the defendant is to be believed in its entirety, then the conduct of both families is incomprehensible. The evidence in the record before us is extremely unsatisfactory. In a similar case, People v. Martin, 380 Ill. 328, the Supreme Court has said:

"The evidence does not create in our minds the abiding conviction of the guilt of plaintiff in error, which is necessary in order for us to sustain the conviction. (People v. Serrielle, 354 Ill. 182; People v. Nemes, 347 id. 268; People v. Fitzgibbons, 343 id. 69.)"

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

Reversed and Remanded.

Robson and Schwartz, JJ., concur.

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15 I.A.^{2d} 578

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

Police officer Michael Hogan filed an information in the Municipal Court of Chicago charging Frank E. Falkenberg, Jr., with operating a motor vehicle while under the influence of intoxicating liquor. Prior conviction for a similar offense was alleged in an amended information. Upon a plea of not guilty and waiver of a jury, the court after a trial found defendant guilty and fixed punishment at ninety days imprisonment, the mandatory minimum for a second conviction under Section 47 of the Uniform Act Regulating Traffic on Highways, Ill. Rev. Stat. 1953, ch. 95-1/2, par. 144. The court denied defendant's motions for a new trial and in arrest of judgment. He appeals.

The evidence introduced by the People shows that on April 28, 1954, at about 11:30 p.m., Officer Hogan and a fellow officer received a radio call to investigate an accident at 4676 North Elston avenue, Chicago, Illinois. Arriving there

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

which are satisfied by the functions u_i and v_i in the domain G . It is shown that the system has a solution if and only if the functions f_i and g_i satisfy certain conditions.

2. In the second part of the paper the problem of the uniqueness of the solution is considered.

It is shown that the solution is unique if the functions f_i and g_i satisfy certain conditions. The proof is based on the method of the maximum and minimum of the functions u_i and v_i . It is shown that if the functions f_i and g_i satisfy the conditions

then the solution is unique. The proof is based on the method of the maximum and minimum of the functions u_i and v_i . It is shown that if the functions f_i and g_i satisfy the conditions

then the solution is unique. The proof is based on the method of the maximum and minimum of the functions u_i and v_i .

3. In the third part of the paper the problem of the construction of the solution is considered. It is shown that the solution can be constructed by the method of the successive approximations.

4. In the fourth part of the paper the problem of the stability of the solution is considered. It is shown that the solution is stable if the functions f_i and g_i satisfy certain conditions.

they found John Biolek, a bartender in the tavern at that address. From him they learned that his car, a red Pontiac, parked in front of the tavern on the west side of Elston avenue and facing southeast, had just been struck by a 1948 Dodge sedan traveling southeast. He said that the driver of the Dodge, a white man, had been its sole occupant, and gave them its license number. He told them that he had seen the Dodge turn right at the next intersection. The officers drove in the direction indicated and soon discovered a Dodge sedan parked in a vacant lot off an alley behind the 4650 Elston avenue building. Its lights were out. Its license number ~~was~~ the same as that given by Biolek. Its right front fender and side were damaged. Red paint scratches showed up on its right front fender. In the front seat, alone and asleep, they found the defendant. Asked if he had just hit a car, he admitted that he had. He said he did not know why he had left the scene of the accident. He denied that he had been drinking. His breath smelled strongly of alcohol. His face was flushed, the pupils of his eyes were dilated and watering. His speech was slurred. They took him to the station where defendant submitted to a balance-walking-and-turning test. He swayed. He refused the finger-to-nose and picking-up-coin tests. Later taken to the Navy Pier, he refused the Drunkometer test. The arresting officer, Hogan, has been a policeman for seven years. He has arrested more than two-hundred persons for drinking driving. He did not

know the defendant and had never before seen him. He stated that in his opinion defendant when arrested was under the influence of intoxicating liquor.

Defendant testified that he had not admitted participation in the accident to the officers, denied that he lay slumped across the seat and asleep when they discovered him and asserted that his car's headlights were on at the time. He offered the defense of alibi. He said his license had been revoked because of his prior conviction and he had not driven his car for several weeks; that one Walker telephoned him at his home and asked if he had a car for sale, and defendant said he did. Walker came to his home, 4590 Elston avenue, and together they picked up his car at a parking lot about a block distant. In order to test it, Walker drove the car. They traveled northwest on Elston avenue. They did not return southeast on Elston avenue. They were gone some minutes. They parked the car in the vacant lot when they returned. He and Walker talked price. Walker said he wanted to make a telephone call and went to a drugstore across the street. Walker had been gone about 10 minutes when the officers discovered the car, arrested the defendant and took him to the station.

He had not seen Walker before and has not seen him since. The damage to his car? He has not looked at it lately. He has never noticed whether there were red paint scratches on the damaged right front fender.

On cross-examination, defendant stated that he had not

advertised his car for sale. But "it was general knowledge" that his car was for sale. At this point the court foreclosed further cross-examination by the People and made a finding of guilty.

The defendant argues that the corpus delicti cannot be proved by the extrajudicial confession or admission of the defendant alone. (People v. Davis, 358 Ill. 617.) It is true that some corroborative proof inspiring belief in the truth of the confession or admission is required. Bergen v. People, 17 Ill. 425. Direct and positive evidence, however, is unnecessary. Campbell v. People, 159 Ill. 9. The evidence aliunde need not of itself prove the corpus delicti beyond a reasonable doubt. People v. Hannibal, 259 Ill. 512; People v. Harrison, 261 Ill. 517; People v. Henderson, 378 Ill. 436; People v. Lueder, 3 Ill. 2d 487. The extrajudicial admission or confession voluntarily made may be considered in connection with the other evidence to establish the corpus delicti. People v. Hein, 315 Ill. 76; People v. Nachowicz, 340 Ill. 480. An admission giving rise to inferences of guilt but not amounting to a confession may be considered in the light of other evidence, including a defendant's attempt to establish an alibi. People v. Wynekoop, 359 Ill. 124. The same evidence may be used to prove both the existence of the crime and the guilt of the defendant. The test is whether the whole evidence proves that the crime was committed and that the accused committed it. People v. Henderson, 378 Ill. 436; People v. Brown, 379 Ill. 262;

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People v. Gavurnik, 2 Ill. 2d 190.

Defendant denied, not only that he was the driver of the Dodge, but further even denied that the Dodge was involved in the accident. Assuming this to be true, the police officer, Hogan, was lying or mistaken, and the damage to the Dodge and the red paint scratches on its right front fender were either nonexistent or were the result of another accident. Any reasonable explanation tendered by defendant might have supported this hypothesis. Instead, defendant evasively avoided any such explanation and offered rather the weak excuse that he has not lately looked at the fenders of his automobile. This, in our opinion, considered with defendant's extrajudicial admission and all other evidence was sufficient to prove the corpus delicti and defendant's guilt beyond a reasonable doubt.

Defendant next contends that the court erred in admitting into evidence an incomplete record of his prior conviction for a similar offense because the record did not show the essential jurisdictional facts. The assistant State's attorney who prosecuted the former action, and one of the arresting officers in that case, testified at length to the identity of the defendant and the nature of the prior proceeding and conviction. Counsel who represented the defendant offered no objection to this testimony. He cross-examined these witnesses and by so doing made it plain that defendant submitted to the jurisdiction of the court in the former proceeding and that the court had jurisdiction of

[illegible]

the subject matter to pronounce the judgment of conviction. It was not until defendant completed his cross-examination and the People offered the complaint and judgment of the former conviction in evidence that defendant objected on the ground that they did not constitute the complete record. We are of the opinion that under the circumstances existing in this case the evidence amply supports the recitals of jurisdiction in the judgment of the Municipal Court of Chicago in the former proceeding.

Defendant next contends that the court erred in admitting in evidence Officer Hogan's testimony concerning his conversation with Biolek, owner of the red Pontiac struck by defendant's car, because the conversation occurred outside defendant's presence and Biolek was not present to testify in the proceeding. Not only did defendant offer no objection to Hogan's testimony but he conducted lengthy cross-examination of Hogan upon all aspects of his testimony. Only then did defendant move to strike the hearsay testimony. The court denied the motion because it came too late. Objections must be timely. People v. Brown, 368 Ill. 177, 182; Swigar v. People, 109 Ill. 272, 276; People v. Jenko, 410 Ill. 478, 482-3; People v. Perez, 412 Ill. 425, 429.

Defendant assigns a nonjurisdictional error with regard to the amended information, and other errors with regard to the admission of certain matters in evidence. Defendant without objection submitted himself to the jurisdiction of the court and failed to interpose any objections

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below to the admission of the evidence. He waived any errors thus committed and cannot raise objections in these matters for the first time in this court.

The judgment of conviction is affirmed.

Judgment affirmed.

McCormick, P. J., and Schwartz, J., concur.

help in the solution of the problem, we have given any
 of the things mentioned above, which are of interest in these
 cases, and which are of interest in these cases.
 The first of these is the fact that the problem is of interest
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 interest in these cases.

143 A

46493

5 I.A.^{2d} 579

THE PEOPLE OF THE STATE
OF ILLINOIS, ex rel.
GWENDOLYN LYLES,

Plaintiff-Appellant,

v.

JUDSON E. HARRISS, Acting
Judge of the Probate Court,
HERMAN M. BENNETT, and
THOMAS D. NASH,

Defendants-Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE
COURT.

Relator filed a petition for a writ of mandamus,
commanding the defendant, Judson E. Harriss, Acting Judge
of the Probate Court of Cook County, to grant an appeal
from certain orders entered by him or in the alternative
to expunge the orders. These, as stated in relator's
brief, are:

An order denying the motion of relator to vacate
a previous order removing her as administratrix of the
estate of Stella King.

An order denying her motion to vacate a judgment
for \$1021.63 entered against her in favor of Herman M.
Bennett, one of the defendants.

An order denying her motion to vacate an order
holding her in contempt of court and sentencing her to
serve one hour confinement in the custody of the
bailliff and considering that said sentence has been
served.

The trial court sustained a motion to strike the petition for
mandamus and dismissed the petition.

It appears that the relator Gwendolyn Lyles on

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her petition in the Probate Court had been appointed administratrix of the estate of one Stella King and that thereafter defendant Bennett filed a petition seeking to have her removed. Following the filing of the petition for removal, a motion to strike was overruled and relator then filed an answer. Neither the petition for removal, the answer, nor any summary thereof is set forth in the petition for mandamus or anywhere else in the record. An inkling of the true nature of the case appeared on oral argument, to-wit: that the petition sought the removal of the relator because of false representations made to procure her appointment by the Probate court, and charged that having been appointed administratrix, she used that position in an effort to fraudulently participate in another estate in which Bennett had an interest. Issue having been joined, the Probate court proceeded to hear the case. Bennett then served notice upon the relator, as administratrix and as respondent to the petition, to admit certain averments of that petition, in accordance with Rule 18 of the rules of the Supreme court of this state. After what appears to have been a prolonged legal battle, the relator was found guilty of contempt for her refusal to comply with the order of the Probate court, and a judgment was entered against her and in favor of Bennett for \$1021.63. The orders of which relator complains were subsequently entered.

It is argued that the Probate court had no jurisdiction because it is limited to probate matters and therefore cannot compel compliance with Rule 18. This appears to us

as a challenge to the power of the court to subpoena witnesses or to enter judgments for contempt for failure to comply. The Civil Practice Act and the Rules of the Supreme Court of Illinois apply to proceedings under the Probate Act. Ch. 3, Ill. Rev. Stat. 1953, Sec. 155; (Probate Act, Sec. 5); In re: Estate of Schafer, 344 Ill. App. 608, 613.

It is also charged in the petition that Bennett was not an interested person, as he was required to be; that he was a stranger and "for all purposes...some person who came in off the street." This was not enlightening to the court and when, on oral argument, we inquired what was really meant, it appeared that the situation was complicated, involving intrigue having to do with another estate.

While a writ of mandamus will lie to expunge a judgment or order void for want of jurisdiction, a petition seeking such relief must reveal a clear right to the relief sought. People ex rel. Pignatelli v. Ward, 404 Ill. 240, 244; Bengson v. City of Kewanee, 380 Ill. 244, 250; People v. Village of Crotty, 93 Ill. 180, 187. A writ of mandamus will not be issued to either direct or modify the exercise of judicial discretion. People ex rel. Elliott v. Juergens, 407 Ill. 391, 400; The People v. Cook, 311 Ill. 429, 432; People ex rel. Eureka C. Storey v. Knickerbocker, 114 Ill. 539, 547. The writ of mandamus may not be issued as a substitute for appeal or to correct judicial error. The People v. Holmes, 312 Ill. 285, 286-7; People ex rel. Daniels v. Jarecki, 342 Ill. App. 363. The petition is replete with argumentative

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It is also charged that the relator was not an interested person, as she was required to be; that she was a stranger and "for all purposes...some person who came in off the street." This was not enlightening to the court and when, on oral argument, we inquired what was really meant, it appeared that the situation was complicated, involving intrigue having to do with another estate.

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averments and conclusions. It contains similes characterizing the nature of Bennett's charges, but nowhere are those charges set forth verbatim or specifically summarized, nor is the evidence admitted in the Probate court even discussed. All we can gather is that Bennett obviously had an interest in seeking to have the relator removed as administratrix of the estate of Stella King; that the issue was joined; that lengthy hearings were held; and that the orders objected to were entered. These orders are not to be found in the petition for mandamus or anywhere in the record. Nothing is said of any attempt made by relator to perfect appeals from those orders. The grounds on which the motions to vacate the orders were based are not set forth nor are the motions themselves made part of the petition.

Other points than those we have discussed are made in relator's brief, but on the meager facts presented to us, we deem them to be of no merit. Courts must deal with factual situations. We cannot apply principles of law to vaguely generalized situations described by one of the parties.

Judgment affirmed.

McCormick, P. J., and Robson, J., concur.

160 A 5 I.A. 2d 580

46511

RUDOLPH POMPA,

Appellee,

v.

EDWARD KAUFMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint Rudolph Pompa alleged that on July 1, 1952, Edward Kaufman operated a place of business in Chicago and that Kaufman, by Anthony Saybinski, his servant, without cause or provocation, shot plaintiff with a revolver, injuring him. Plaintiff sought a judgment against Kaufman and Saybinski. In an answer Kaufman denied that Saybinski was acting as his servant at the time of the shooting, and as an affirmative defense alleged that if Saybinski shot plaintiff he did so "in justifiable defense." Saybinski was dismissed from the case, on motion of plaintiff, before it was submitted to the jury. A trial resulted in a verdict and judgment in favor of plaintiff for \$1,500. Defendant, appealing, prays for judgment notwithstanding the verdict.

The question presented is whether the evidence, in its aspect most favorable to the plaintiff with the reasonable inferences arising therefrom, supports the complaint. On July 1, 1952, Edward Kaufman owned a restaurant, currency exchange, tavern and tobacco store on the ground floor at the northeast corner of 22nd and Halsted Streets, Chicago. Saybinski, his bartender, was in charge of the tavern in the early morning hours and three other men were employed there. Plaintiff, a

married man who is purchasing his house, worked until twelve midnight. The testimony in behalf of the plaintiff is that he and two companions entered the tavern at about 3:30 A. M. At that time the defendant was asleep in his apartment on the second floor. Plaintiffs say that they ordered beer and that Saybinski refused to serve them, that there was an altercation and that Saybinski turned around, procured a gun from the back bar and shot plaintiff. Saybinski did not testify. A police officer who responded to a call, testified that the bartender told him that he had refused to serve the three men because it was "after hours"; that he became afraid of them; that he shot plaintiff because after he, Saybinski, refused him a drink plaintiff stepped back and pulled something shiny that looked to plaintiff like a knife; and that he became frightened, pulled his gun out and swung it at plaintiff and that it went off accidentally. There was evidence on behalf of defendant that plaintiff and his companions entered the premises after 4:00 A. M., the closing time, and that the bartender told them that he would not serve them because it was after closing time. A witness for defendant testified that he saw plaintiff put a shiny object on the bar and heard him threaten the bartender.

Before the police arrived one of plaintiff's companions left. The police searched plaintiff and his remaining companion but did not find any weapon. Plaintiff says that all he had in his hand was a dollar bill. It is apparent that there was competent evidence to support the judgment. The

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative.

2. In the second part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved. It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative.

3. In the third part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved. It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative.

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bartender was in charge of the tavern at the time of the occurrence. The revolver, readily accessible, was the property of the defendant. The altercation and the shooting arose out of the employment and the bartender was within the scope of his employment. The jury had a right to believe that there was no sufficient provocation for the shooting.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., AND NIEMEYER, J., CONCUR.

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defendant was in charge of the tavern at the time of the
 occurrence. The revolver readily accessible was the property
 of the defendant. The altercation and the shooting arose
 out of the employment and the defendant was within the scope
 of his employment. The jury had a right to believe that there
 was no criminal provocation for the shooting.

For these reasons the judgment is affirmed.

WILBERT AFFIDAVIT.

WILBERT, J., and WILBERT, J., JUDGES.

161 A

5 I.A.^{2d} 580

46526

ROBINSON AUTO RENTAL, INC.,)

Appellant,)

v.)

PASCAL SYSTEM, INC., and)
JOSEPH J. SOSO,)

Appellees.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 25, 1953, Robinson Auto Rental, Inc., sued Pascal System Inc., for damages in an automobile collision. The return of the balliff certifies that he served the summons on June 27, 1953, by leaving a copy thereof together with a copy of the praecipe and statement of claim with C. Morrison, agent of the defendant. On July 6, 1953, a default order was entered and on February 4, 1954, at an ex parte hearing a judgment was entered for \$750. A demand under the execution was made on the defendant on March 10, 1954. On March 15, 1954, defendant moved to vacate the judgment on the ground that the summons was not served. On March 22, 1954, the defendant filed its petition and an affidavit in support of the motion. The affidavit by C. Morrison states that he was employed intermittently by the defendant for 14 years; that he was so employed on June 27, 1953; that he is the manager of the automobile leasing department of the defendant and in charge of the office; and that he was in fact not served with a summons

on June 27, 1953, nor at any other time. The court, after hearing evidence on the issue of service, vacated the judgment. Plaintiff, appealing, asks that the order be reversed.

Carl F. Stolteben, called by the defendant, testified that he has been a bailiff for 24 years and served 8 to 10 processes a day. When asked about the service on June 27, 1953, he answered: "If my signature appears on the received copy, I served C. Morrison." He did not have an independent recollection of serving Morrison, since "it was 10 months ago." He said that a Mrs. Simpson was generally served but she evidently was not there, so he served it on C. Morrison; that his signature was on the copy; that it was served on Saturday, June 27, 1953, and that on June 29 the sealed copy was "signed out." On ~~cross~~-examination he identified the sealed copy of the summons on which he made his return and identified his signature. He said it was served on the defendant and that the individual was C. Morrison. He obtained that name "from the man I gave the copy to and served it on."

Carroll F. Morrison, called by defendant, testified that he "may have been served a summons by this gentleman, but I can't say for sure." He said that he was with the defendant 14 or 15 years and that he was not served with a summons on June 27, 1953. On cross-examination, the witness stated that he occasionally received summonses from

process servers, but that was not his duty. He handled the leasing of automobiles and is the only C. Morrison employed by the defendant. He did not recall receiving any legal papers during the week of June 27, 1953. He could definitely say that he did not get a legal paper the last couple of days of June, 1953. He believes he got legal documents in that month. On occasions he had to look at his records with reference to automobile accidents and in that case he looked at letters and forwarded such documents to their attorneys or insurance carriers. He received documents in the month of June, 1953, but would have to check his records. He did not remember any of the months in which he received them. He could not say that he recalled seeing Mr. Stolteben before. His face was not familiar to him. He could not definitely say that Mr. Stolteben ever handed him any documents when he was working for defendant.

The stability of judicial proceedings requires that the return of an officer made in the due course of his official duty and under the sanction of his official oath should not be set aside merely upon the uncorroborated testimony of the person on whom the process has been served, but only on clear and satisfactory evidence. Marnik v. Cusack, 364 Ill. 362; Stasel v. American Home Security Corp., 362 Ill. 350; Cannata v. White Owl Express, Inc., 339 Ill. App. 79; Livestock Mortgage Credit Corp. v. Keller, 336 Ill.

App. 282. Defendant maintains that there is clear and convincing proof that it was not served. It says that the deputy bailiff's "evasiveness and lack of memory" and confusion in the clerk's and bailiff's records supports the order of the trial court. In the bailiff's return book on the line showing the instant case there was an entry of "June 20" in the column entitled "Date of Service" opposite Morrison's name. The suit was not filed until June 25, 1953. This was an erroneous entry. He testified that he served the summons June 27, 1953. His return book carried the date June 29, 1953. He explained ~~that~~ this was the following Monday when he "signed the sealed copy out." The docket of the clerk carries the notation "Summons filed, returned served June 3, 1953." We do not think that the erroneous entries impeach the return of service of the summons. It has been held that the failure of an officer making the return to remember the service is not such clear and satisfactory proof as to impeach the return. Marnik v. Cusack, supra.; Livestock Mortgage Credit Corp. v. Keller, supra.

Mr. Morrison was on the defendant's premises on the day the deputy states he served the summons. He had previously been served with process in other cases. The deputy explained his method of service and mentioned a Mrs. Simpson, who usually accepted service for the defendant. He said; "She evidently wasn't there so I served it on C. Morrison." Mrs. Simpson did not testify. The testimony of Mr. Morrison is

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not convincing. As the record does not contain clear, and convincing evidence to support defendant's motion, the order of March 26, 1954, is reversed.

ORDER REVERSED.

FRIEND, J., AND NIEMEYER, J., CONCUR.

46588

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

THOMAS MOBILIO,

Plaintiff in Error.

162 A
15 I.A. 581^{2d}
ERROR TO

CRIMINAL COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The first count in an indictment in the Criminal Court of Cook County charged Thomas Mobilio with assault with a deadly weapon (loaded revolver), the second count with assault with a deadly weapon (a blunt instrument) and the third count with assault and battery, all upon Irving Walton, hereinafter called the complainant. The defendant was found guilty and sentenced to serve ten days in the County Jail and to pay a fine of \$100 and costs. Motions for a new trial and in arrest of judgment were overruled. Defendant prosecutes a writ of error to reverse the judgment.

The alleged assault occurred on Thursday, November 19, 1953, at about 1:00 p.m., near 4500 South Harlem Avenue in Cook County. It is a four lane highway without curbstones and with shoulders. The defendant, a deputy sheriff then off duty, was driving north on Harlem Avenue in his Ford automobile and Laverne Hines, seated to his right on the front seat, was riding with him. At the same time the complainant was driving his Nash automobile north on Harlem Avenue. The defendant was driving in the inner lane and the complainant in the outer lane. An automobile being driven in the opposite

direction came over on the wrong side of the road while passing a truck and into the pathway of defendant's car, because of which he swerved a little to the right and came close to the automobile of complainant. The latter then cut off the defendant's automobile two or three times, the last time forcing that car into the southbound inner lane where it was almost struck by a truck. Complainant admits cutting off defendant's car twice. The defendant tried to get complainant to pull over to the east shoulder of the road. Complainant denied that he heard defendant's call to pull over. Thereupon the defendant pulled out his revolver and fired a shot into the air from his left front window. Complainant heard the shot and pulled over to the side of the road and onto the shoulder.

The defendant drove his car onto the shoulder of the road and stopped it about ten feet behind the complainant's car. It was a clear day and "fairly warm." Defendant got out of his car. The complainant in compliance with defendant's order, then got out of his car. Defendant's companion remained seated in his car with the windows open. Complainant said that when the defendant approached "his auto the first time he had a gun in his hand." On cross-examination he said "there was something in his hand; I can't say what it was for sure." He also said that the defendant showed a star while he was jerking him around. He said the defendant kept jerking and pushing him at the same time; that he hit him (witness) in the mouth; and that when he was hit in the mouth he went

to his knees and "more or less blacked out there." The next thing that the complainant remembered is that defendant jerked him and told him to get going for Iowa and pushed him into his car. Complainant had Iowa license plates on his car.

Richard J. Seeden, called by the People testified that he was a passenger in an automobile being driven south on Harlem Avenue at the time of the incident. The driver of his car made a U turn and proceeded north. He testified that the defendant had something in his hand which was bigger than his hand but he could not say what it was. He saw only one blow struck.

Edmund English, called by the People, testified that he was employed as a lineman by the Public Service Company; that with another employee he was driving north on Harlem Avenue in a company vehicle; that he noticed that the Ford had the Nash forced over to the curb; that he "stopped to watch this"; that the Ford was in front of the Nash; and that the Ford and Nash were up against the curb. The car in which the witness was seated stopped about 200 feet south of the other two cars. He said he saw a gun in defendant's right hand and that he "thought" defendant struck complainant seven or eight times.

The defendant and his passenger testified that he laid his gun on the seat after he shot into the air; that after stopping his car on the shoulder he got out and walked over to complainant's car with his wallet in his right hand; that he showed complainant his star which was in the wallet; that

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5. In the fifth part of the paper, the problem of the existence of solutions of the system (1) for arbitrary values of the parameters α and β is solved. It is shown that the system (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

6. In the sixth part of the paper, the problem of the existence of solutions of the system (1) for arbitrary values of the parameters α and β is solved. It is shown that the system (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

7. In the seventh part of the paper, the problem of the existence of solutions of the system (1) for arbitrary values of the parameters α and β is solved. It is shown that the system (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

8. In the eighth part of the paper, the problem of the existence of solutions of the system (1) for arbitrary values of the parameters α and β is solved. It is shown that the system (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

9. In the ninth part of the paper, the problem of the existence of solutions of the system (1) for arbitrary values of the parameters α and β is solved. It is shown that the system (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

10. In the tenth part of the paper, the problem of the existence of solutions of the system (1) for arbitrary values of the parameters α and β is solved. It is shown that the system (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

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he asked complainant to get out and walk as a test for sobriety; that when they got between the two cars the complainant grabbed him (defendant) and said he didn't care who defendant was; that he was going to teach defendant not to cut him off; that as complainant grabbed defendant the former was struck once by defendant; that complainant fell and immediately got up; that defendant told complainant that he was taking him to the station; that complainant "pleaded" saying he was an out-of-town man and was going home; that he would lose his job as a truck driver if arrested; and that defendant let him go. When the chief of the highway police first questioned him about the incident the defendant denied that he was in the vicinity. Shortly thereafter he admitted his participation therein.

We concur in the defendant's contention that the evidence fails to establish beyond a reasonable doubt that the complainant was assaulted with a revolver. The complainant did not see a revolver in the defendant's hand. He said there was something but he did not know what it was. Mr. Seeden saw defendant's hands, said there was something in one of them but that he could not say what it was. The defendant and his companion testified that there was no gun in his hand. Mr. English, one of the People's witnesses, testified that he saw a gun in the right hand of defendant. He was 150 to 200 feet behind the parties. The testimony of this witness differs materially from that of all the other witnesses. He claims there was a curb and that the cars were at the curb and not on the shoulder. He said defendant's

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car was in front of complainant's car. All the other witnesses said that the cars were on the shoulder and that defendant's car was in the rear of complainant's car. He said the incident occurred 25 feet out in the prairie. The other witnesses said it occurred just to the right of the two cars. He testified that defendant struck complainant seven or eight times. All the other witnesses, including complainant, said he struck only once. There is no evidence to support the second count charging assault with a deadly weapon, namely a blunt instrument. It is obvious that the defendant was not guilty under the third count charging assault and battery because the judgment included a sentence to serve ten days in the County Jail. The punishment for simple assault or assault and battery is a fine of not less than \$3 nor more than \$100. Par 57, Sec. 22, Ch. 38, Ill. Rev. Stat. 1953.

Because of the failure to prove the defendant guilty beyond a reasonable doubt the judgment of the Criminal Court of Cook County is reversed.

JUDGMENT REVERSED.

FRIEND, J., AND NIEMEYER, J., CONCUR.

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VICTOR CZERWINSKI and ANNE
CZERWINSKI,

Appellees,

v.

FRANK J. TOMECEK and ELIZABETH
TOMECEK,

Appellants.

15 I.A.^{2d} 582

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit upon a promissory note executed by defendants for the sum of \$3000.00, payable to bearer. They claimed to be the owners and holders of the note in due course for a valuable consideration. Trial by the court without a jury resulted in finding and judgment in their favor for \$3209.10, from which defendants appeal.

The note was dated June 28, 1952 and bore interest at the rate of 3-1/2 per cent per annum, evidenced by ten interest coupons. Neither of the installments of interest which became due December 28, 1952 and June 28, 1953, was paid. By reason of these defaults and in accordance with the provisions of the principal note, plaintiffs elected to declare the entire indebtedness due and sought judgment thereon.

Plaintiffs and defendants were the principal witnesses upon the hearing. Anne Czerwinski testified that she and her husband had been purchasing mortgages from one John Sykora for about twenty-five years; that in August 1951 they received a letter from him inquiring if they would be interested in taking a mortgage on a building on Euclid

avenue in Berwyn, Illinois, pursuant to which they went out to look at the premises, and on August 28, 1951 she telephoned Sykora to say they would buy the mortgage; that on the following day she called on Sykora and gave him a check for \$3000.00; that he gave her a letter in the form of a receipt and told her that when the papers were ready she would get them; that in previous transactions with Sykora he had given her the note and made a notation on the flap of the envelope containing it concerning other papers she was to receive later; that when she had previously bought mortgages she was given the title papers and insurance policies in addition to the note; that six months later she went to see Sykora to ask him why she did not receive the papers, said that she would rather have her money returned, and that he gave it to her; that on May 12, 1952 Sykora called up to say that defendants wanted the mortgage, and he inquired whether she still desired to obtain it; that she told him she would take the mortgage, and on the following day she gave him the money; that in July 1952 she went to Sykora and obtained the note and interest coupons in an envelope which was marked "Mortgage," and on the flap of which there was a notation of the other papers she was to get when they were completed; that at that time Sykora paid her the interest from May 13 to June 28, 1952; that this was the last time she saw Sykora, he having been subsequently arrested; that she received no other papers; that she knew the interest note and coupons were part of the mortgage; that she did not contact

or talk to defendants, whom they did not know, prior to the time she got the note, and did not know there was a prior mortgage on the property. The note which was introduced in evidence showed on its face that it was the principal note described in a trust deed to John O. Sykora, trustee, dated June 28, 1952. There was a designation on the back of the note giving the makers the privilege to make pre-payments upon the principal, and prescribing the manner in which it could be exercised.

On behalf of defendants Frank J. Tomecek testified that he and his wife Elizabeth owned a bungalow at 3713 Euclid avenue, Berwyn, Illinois, as joint tenants; that they had bought the property in 1947; that there was a partially unpaid mortgage of \$3000.00--it had been reduced to \$2000.00--which was still of record, due to expire June 7, 1952, and a month or two before that Sykora called and inquired whether they wanted to extend the mortgage; that Tomecek told him to again make it for \$3000.00 since they needed the money. About two months later Sykora again "called up and said we should go to his office and sign the papers and cancel the first mortgage so he could get the money, extra money we should get from him"; that he and his wife went to Sykora's office but he was not in; that in his absence a girl in the office asked them to sign the papers; that they never received any papers from Sykora or the plaintiffs--the old mortgage, the notes secured thereby or canceled interest coupons; that Sykora was to give them the canceled first mortgage and \$1000.00

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(c) \mathcal{C}_1 is a \mathcal{C}_2 -subalgebra of \mathcal{C}_1 if and only if $\mathcal{C}_1 \subseteq \mathcal{C}_2$.

in cash; that they never obtained any money from Sykora; that Tomecek called him on the phone, but the papers were never received; and that he never saw Sykora thereafter. At that time he did not know who was the holder of the old mortgage. When he made payments of interest and principal upon the old mortgage they were made at Sykora's office.

Mrs. Tomecek testified that she signed the note and mortgage in question. She also signed the mortgage placed upon the property when they first bought it. She never received any canceled mortgage or any money in payment thereof, and had no conversation with Sykora other than to call him to inquire whether or not the papers were ready.

Victor Czerwinski testified that he left all dealings with Sykora to his wife; that he had no conversations with Sykora; and that nothing ever came to his attention concerning the note which would cause him to be suspicious or to suppose that there was anything irregular about it before he bought it.

As ground for reversal it is first urged by defendants that plaintiffs did not acquire the rights of holders in due course inasmuch as there was no negotiation of the note sued upon. The record discloses that the note was delivered by Sykora to Anne Czerwinski on July 14, 1952. Section 30 (par. 50) of article III of the Negotiable Instruments Law (Ill. Rev. Stat. 1953, ch. 98) provides that an instrument payable to bearer is negotiated by delivery, and since the note in question was so payable, its delivery on the last

mentioned date was a negotiation.

It is also urged that plaintiffs were not the purchasers of the note but were, if anything, the intended mortgagees of a mortgage. Under the well established rule in this state, the fact that a note is secured by a mortgage or trust deed does not affect its status as a negotiable instrument if it possesses the attributes of negotiability set forth in section 1 (par.21) of article I of the Negotiable Instruments Law. The note sued on meets this test. See Zollman v. Jackson Savings Bank, 238 Ill. 290, and Pflueger v. Broadway Trust and Savings Bank, 351 Ill. 170.

Lastly it is urged that a purchaser of a note and trust deed from the trustee mentioned therein is put upon inquiry to ascertain that the trustee has title to the instrument. It is argued that the note on its face was secured by a trust deed to Sykora as trustee, and that since the evidence discloses that Sykora was not the owner it was incumbent upon plaintiffs who acquired the note to inquire whether or not he owned the note and had the right to negotiate it. Implicit in this argument is the question of good faith. There are decisions in this state wherein the question, what is good faith in the purchase of negotiable paper, is considered. In the early case of Schintz v. American Trust and Savings Bank, 152 Ill. App. 76, it was held that good faith is consistent with negligence. In Read v. Kerr, 249 Ill. App. 493, the court observed that there was no evidence in the record that plaintiffs took the note with any knowledge of the alleged

It is also urged that legislation be passed to provide for the establishment of a national system of public health service, and that the Federal Government should take the lead in this work. It is further suggested that the Federal Government should establish a national system of public health service, and that the Federal Government should take the lead in this work.

fraudulent statements made to procure its issuance, but went on to say that "in this State the rule is much stronger and they would be entitled to be considered as bona fide holders for value even though there may have been a suspicion in their minds at the time of the purchase of said note that it was issued as a result of false and fraudulent statements." It was incumbent upon defendants to prove that plaintiffs were guilty of bad faith in the purchase of the note, the presumption being that they were holders in due course. Section 56 (par. 76) of article III of the Negotiable Instruments Law states that "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." In Kavanagh v. American Trust and Savings Bank, 239 Ill. 404, the court held: "Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without knowledge of any defense thereto. Mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the endorsee in acquiring the paper, will not defeat his title."

The question of good faith is one of fact and varies with the circumstances of the persons involved. In the instant proceeding the evidence of good faith on the part of plaintiffs is strikingly apparent. They paid face value for

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1. The first step in the process of identifying a problem is to recognize that a problem exists. This is often done by comparing the current situation with a desired state or goal. Once a problem is identified, the next step is to define the problem more precisely. This involves determining the scope of the problem, the resources available, and the constraints that may be present. The third step is to generate potential solutions. This can be done through brainstorming, research, or consultation with experts. The fourth step is to evaluate the potential solutions. This involves comparing the solutions against the criteria established in the previous steps. The final step is to select the best solution and implement it. This may involve making adjustments or modifications to the solution as needed.

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a note drawing 3-1/2 per cent interest which was bought from a dealer in mortgages with whom they had dealt for some twenty-five years, in his office where he had been established for many years, and received the note and interest coupons with a notation that other papers would be delivered later, as had been the practice in their previous dealings. There is no question but that they relied upon Sykora, whom they felt they could trust; and the fact that they paid face value for 3-1/2 per cent paper, a rather meager return on this type of security, is perhaps the best evidence that there was no bad faith on their part and that they suspected nothing irregular with the security they were purchasing.

It is indeed unfortunate that any of these innocent parties should be subjected to the loss resulting from Sykora's fraudulent conduct, but on the assumption that all the parties to this suit were acting in good faith, the loss as between innocent parties must rest upon the one who made the fraud possible. Drumm Construction Co. v. Forbes, 305 Ill. 303; Madison and Kedzie State Bank v. Madison Square State Bank, 271 Ill. App. 12.

We think the trial judge properly decided the case on its merits in favor of plaintiffs, and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., AND NIEMEYER, J., CONCUR.

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46508

EDWARD BERKSON, Administrator of
the Estate of MARVIN W. BERKSON,
Deceased,

Appellant,

v.

FREMONT A. CHANDLER,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The original plaintiff appealed from a judgment for defendant, an orthopedic surgeon, entered on a directed verdict at the close of plaintiff's evidence in an action charging malpractice and deceit. He died and the appeal is now prosecuted by his administrator. For convenience the original plaintiff is hereinafter referred to as plaintiff.

In the latter part of 1947, or January 1948, when plaintiff was in the early thirties, he suffered pain in the left hip, down through the leg to the heel. He was examined and treated by his family physician, two orthopedic specialists, and at the Billings Clinic. His condition did not improve. On June 22, 1948 he was examined by defendant. On a second visit defendant made a diagnosis of an unstable lumbo-sacral spine with definite possibility of an inter-vertebral herniated disk. This diagnosis was based on the clinical examination and the X-rays taken at the direction of defendant and his predecessors. Defendant performed an exploratory operation in July 1948. He exposed the spinal area from the 4th lumbar vertebra down to the 2nd sacral vertebra, looking primarily for instability and a herniated

disk. The exploration was as complete as he felt justified. To have made it more complete he would have had to take off a great deal more bone throughout the entire area--possibly 100 per cent. The derangement of the joints accounted for the symptoms. He looked for a herniated disk between the 5th lumbar and the 1st sacral vertebrae and did not find any evidence of pathology. He performed a fusion operation on the 4th and 5th lumbar vertebrae. During the operation an anesthetic was administered by intubation--a tube 6 or 7 inches long was inserted through the throat or larynx to the trachea.

After the operation plaintiff complained that his leg was worse and that his throat hurt. He saw a throat specialist in the latter part of 1948 and was advised that he had a granuloma of the right vocal cord--growth of granulation tissue caused by the intubation. In July 1949 plaintiff went to Dr. Loyal Davis, a specialist in neurological surgery. Under his direction a myelogram was taken. From this there appeared to be an obstruction between the 4th and 5th lumbar vertebrae. Dr. Davis made a presumptive diagnosis of herniated nucleus pulposus or an obstruction to the nerves at the region of the myelographic obstruction. He operated. There was some bony callus and evidence of the previous fusion operation, which was fixed and in good position. The 5th lumbar nerve which comes out between the 5th lumbar vertebra and the 1st sacral vertebra was enlarged, red, irritated and swollen. It was humped up over a bony protrusion between the two vertebrae. The nerve, which came out between the 4th and 5th lumbar vertebrae,

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was thin, rather stretched. His operation consisted of removal of enough bone and bony tissue to expose and free these nerves on the left side of the vertebrae. He did nothing with the bony protrusion. The freedom of the two nerves was obtained by the removal of the bone above them. After the second operation plaintiff made a full recovery and all the pains left.

In the third amended complaint, paragraph 11, plaintiff charges that defendant (a) wrongfully performed a surgical operation upon the plaintiff without any cause or need therefor, and performed a fusion on plaintiff's spine and did not remove or operate upon any herniated disk or any disk; (b) knowingly, wilfully, wantonly and maliciously treated plaintiff after the surgery and post-operatively with complete and wilful and wanton indifference, and purposely deceived the plaintiff as to the condition of ill-being in his throat, stating that it was minor and would shortly disappear; (c) knowingly, wilfully, wantonly, fraudulently, designedly, wickedly and maliciously failed, and neglected to inform and disclose to plaintiff that he, defendant, had not performed the surgery for which he had been employed, and had at all times stated to plaintiff that he had in fact removed the herniated disk, well knowing that such statement and representations were false and intended by the defendant to deceive the plaintiff and conceal the fact that defendant had not removed the herniated disk.

At the close of plaintiff's evidence defendant moved for directed verdicts as to each of these charges. The motions were allowed and judgment for defendant entered on the verdict,

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finding defendant not guilty. The question presented on appeal is whether there is any evidence which, when standing alone and taken with its inferences most favorable to plaintiff, tends to support the case charged in the complaint. Osborn v. Leuffgen, 381 Ill. 295.

Plaintiff says that the issue is not defendant's skill, but his failure to use his skill. He concedes that malpractice must be proved by expert witnesses, citing Moline v. Christie, 180 Ill. App. 334, where the court said that negligence or lack of care by a defendant physician or surgeon "can only be established by the testimony of experts skilled in the medical and surgical profession." There is no testimony of this nature as to charges (a) and (b). Dr. Test, an expert witness called by plaintiff, testified, in answer to a hypothetical question, that plaintiff was given a reasonably thorough examination with the exception that the so-called hump (bony protrusion) was not discovered, and that the diagnostic procedure used by defendant was in accordance with the usual practice and procedure. There is no evidence that the bony protrusion contributed in any degree to plaintiff's ill-being. Dr. Davis testified that he did nothing to the bony protrusion; that the nerves were freed by the removal of the bone above them. Plaintiff testified that he had a full recovery after the operation by Dr. Davis, and all the pains left. Dr. Davis, like defendant, made a presumptive or preliminary diagnosis of a ruptured intervertebral disk. He testified that there is no certain

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1. The first thing I noticed when I stepped out of the train at the station was the cold. It was a sharp, biting cold that seemed to penetrate my very bones. I had heard that the weather in the north was harsh, but I had not realized just how cold it would be. The wind was howling, and the snow was falling in thick, heavy flakes. I shivered as I walked towards the entrance of the station, my hands tucked into my pockets. The ground was covered in a deep layer of snow, and the air was filled with the sound of the wind whistling through the trees. I had never experienced such a cold before, and it felt like I had entered a different world.

2. As I walked through the snow-covered streets, I noticed that the people were dressed in heavy coats and hats. They were all bundled up against the cold, and their faces were red from the frost. I saw a group of children playing in the snow, their laughter ringing out in the cold air. They were building a snowman, and one of them was holding a stick of dynamite. I was startled for a moment, but then I realized that it was just a stick of wood. The children were laughing and playing, and I felt a little better. The cold was still there, but it didn't seem so harsh anymore.

3. I had heard that the people in the north were friendly and hospitable, but I had not realized just how true that was. As I walked through the streets, I saw people smiling at me, and some of them were waving their hands. I felt a little more at ease, and I began to relax. The cold was still there, but it didn't seem so harsh anymore. I was in the north, and I was safe.

4. The first thing I noticed when I stepped out of the train at the station was the cold. It was a sharp, biting cold that seemed to penetrate my very bones. I had heard that the weather in the north was harsh, but I had not realized just how cold it would be. The wind was howling, and the snow was falling in thick, heavy flakes. I shivered as I walked towards the entrance of the station, my hands tucked into my pockets. The ground was covered in a deep layer of snow, and the air was filled with the sound of the wind whistling through the trees. I had never experienced such a cold before, and it felt like I had entered a different world.

5. As I walked through the snow-covered streets, I noticed that the people were dressed in heavy coats and hats. They were all bundled up against the cold, and their faces were red from the frost. I saw a group of children playing in the snow, their laughter ringing out in the cold air. They were building a snowman, and one of them was holding a stick of dynamite. I was startled for a moment, but then I realized that it was just a stick of wood. The children were laughing and playing, and I felt a little better. The cold was still there, but it didn't seem so harsh anymore.

diagnostic means that will tell you whether there is a ruptured disk, and that his preoperative diagnosis that such condition existed was not verified by the operation. No one testified that the fusion operation on the 4th and 5th lumbar vertebrae or the exploratory operation were unnecessary. Plaintiff's complaint in his brief, contrary to the allegations of his complaint, is that defendant did not go far enough in his exploration.

Plaintiff's second charge (paragraph 11 (b)) is that defendant wilfully, wantonly and maliciously treated plaintiff with complete and wilful and wanton indifference and purposely deceived plaintiff by telling him that the condition of ill-being in plaintiff's throat was minor and would shortly disappear. Plaintiff testified that he complained that he was hoarse and his throat was bleeding, and defendant replied that it was nothing, you were just operated on, it will be O.K.; that in October or November defendant told him to see a throat specialist. The throat specialist plaintiff consulted testified that he found a granuloma of the right vocal cord and that it was the size of a small cherry; that he advised plaintiff to go on a silence treatment and see if it would not disappear; that in March 1949 it had decreased to the size of a large matchhead and he decided to keep plaintiff on a silence regime; that if there is injury to a vocal cord following intubation he would not prescribe medicine, just local silence or surgery, and spraying to sooth the patient. On defendant's motion to direct a verdict

on this charge the court suggested, over defendant's objection, that he would permit plaintiff to amend the charge to negligence in treating plaintiff for the throat condition but would not permit the charge of wilfulness and wantonness to go to the jury. Plaintiff refused to accept this suggestion and insisted upon his right under the charge to introduce evidence of the defendant's wealth of approximately \$250,000. The court thereupon sustained the defendant's motion as to the charge as pleaded. Plaintiff does not direct our attention to any specific act or omission tending to establish a charge of wilfulness and wantonness in failing to care for plaintiff's throat condition. The evidence of plaintiff's throat specialist is that he did nothing other than to put plaintiff on a local silence regime. He testified positively that he would not prescribe medicine for the ailment.

The third charge (paragraph 11 (c)) is of fraud and deceit, based upon the alleged false statement of defendant that he had removed a herniated disk. One of the essential elements of actionable fraud is injury or damage resulting from the alleged fraud or deceit. Struve v. Tatge, 285 Ill. 103, 109. There is no evidence tending to establish damage or injury resulting from the alleged statement that the herniated disk had been removed. Whatever damages are shown are those resulting from defendant's alleged malpractice. Such damages cannot support an action for deceit. Church v. Adler, 350 Ill. App. 471, 484.

The court did not err in directing a verdict for defendant. The judgment is affirmed.

AFFIRMED.

BURKE, P. J., AND FRIEND, J., CONCUR.

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165 A
46534

CAMPBELL & CO., INC., a corporation,

Appellee,

v.

STILLMAN J. STANDARD, Director
of the Department of Agriculture
of the State of Illinois, and
LOWELL D. ORANGER, Superintendent
of the Division of Foods, Dairies
and Standards of the State of
Illinois,

Appellants.

5 I.A.^{2d} 584

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a declaratory judgment construing the phrase "bulk horse meat" in section 2.1 of the statute commonly known as the Horse Meat Act, as amended in 1953 (Ill. Rev. Stats. 1953, chap. 56 1/2, secs. 240-256) so as to permit plaintiff, a licensed slaughterer of horses in Mattoon, Illinois, to sell and transport undecharacterized horse meat to the Perk Dog Food Company, a Chicago manufacturer of canine food from horse meat, in "chunks" other than "whole carcass, half carcass or quarter carcass" pieces under a permit of defendant Director of the Department of Agriculture of the State of Illinois, hereinafter referred to as the Director.

The case is before us on the original and supplemental complaints for declaratory judgment and injunction and defendants' motion to strike the complaints. Section 2.1 provides that no carcass or part of a carcass of a horse or other animal of the genus equus shall be transported into, or slaughtered in the State of Illinois, or held, kept, sold, offered for sale or given away unless it shall be ground, chopped or comminuted so that no piece shall be

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971).

1. *Chlorophyll a* (Chl *a*)

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the 1990s, the number of people in the world who are illiterate has increased from 1.2 billion to 1.5 billion. The number of illiterate people in the world is projected to reach 1.7 billion by the year 2015. The number of illiterate people in the world is projected to reach 1.7 billion by the year 2015.

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greater than three fourths of an inch in any dimension and unless the mass shall be decharacterized, by thoroughly and evenly mixing therein ground bone or granular charcoal, or by coloring with a harmless coloring matter, other than red, approved by the Department of Agriculture of the State of Illinois, "except that nothing in this Act shall prohibit the sale or transportation of bulk meat (whole carcass, half carcass or quarter carcass) to a licensed processor, if it be decharacterized as provided above; provided further that this Act shall not prohibit the sale or transportation of undecharacterized bulk horse meat to a licensed processor under a permit granted by the Director upon evidence satisfactory to the Director that such bulk horse meat will not be resold or again transported contrary to the provisions of this Act."

Plaintiff applied for a special permit "to sell and transport undecharacterized horse meat in chunks (but not whole, half or quarter carcasses)" to the Perk Dog Food Company, Chicago, Illinois, a licensed processor, hereinafter referred to as the processor. The Director, taking the position, to which he still adheres, that permits authorized by the statute were restricted to permits for the sale and transportation of undecharacterized horse meat in whole, half and quarter carcasses only, denied the application. He issued a permit authorizing sales and transportation in conformity with his views. Plaintiff instituted this action for a declaratory judgment construing the statute. The court decreed that the phrase "bulk horse meat" as used in the statute "is not

intended to be confined to sales and shipments of bulk meat in whole, half, or quarter carcass only, but is to be understood as meaning horse meat in pieces of any size or shape other than in packages," and issued injunctions protecting plaintiff in the sale and transportation of undecharacterized bulk horse meat to the processor in chunks, other than whole, half or quarter carcasses.

A number of words and phrases are defined in section one of the act. Two definitions were added in the 1953 amendment. There is no definition of the term "bulk," unless, as contended by defendants, the words "whole carcass, half carcass or quarter carcass," in the parenthesis following the words "bulk meat" in the first exception in section 2.1, hereinbefore quoted, define and limit the word "bulk" wherever used in the statute, to unboned whole, half or quarter carcasses. Plaintiff contends that the words in the parenthesis are merely descriptive, not definitive. "Package" is defined in the act as "any closed and sealed container which is sold as an unopened unit to the purchaser," and "Piece" means "any quarter, side or cut of any kind which is not in a package." There is no material difference between the statutory definition of "piece" and the generally accepted meaning of "bulk," defined in Webster's New College Dictionary as "a mass of some product not packaged, bottled, etc., for the trade." Each term is applicable to unpackaged meat. "Bulk" is broad enough to include a whole carcass. "Piece," as defined, includes any unpackaged meat other than a whole carcass. "Chunk," as used by plaintiff, is included in the definition of either

word. Plaintiff asks that "bulk" be given its generally accepted meaning. Defendants insist that it be construed in a limited and narrow sense.

The purpose of the statute, as the parties agree, is to protect the public from the unwitting purchase of horse meat without unreasonable interference with sales to licensed processors. Two exceptions to the prohibition of the sale and transportation of horse meat in pieces greater than three fourths of an inch in any dimension are made to permit the sale and transportation of horse meat to licensed processors. In the first exception, which authorizes the sale and transportation of "bulk meat (whole carcass, half carcass or quarter carcass)" to licensed processors generally, the protection of the public is in the decharacterizing of the meat. In the second exception, which authorizes the sale and transportation of "undecharacterized bulk horse meat" to the licensed processor named in a permit granted by the Director, the protection of the public depends wholly on the integrity and law observance of the particular licensed processor and the judgment of the Director, upon satisfactory evidence, that the meat "will not be resold or again transported contrary to the provisions of this Act."

The uncontradicted allegations of the complaint, which we accept as true, are that the bulk (major portion) of plaintiff's business "consists of the sale of horse meat in chunks to processors and canners throughout the United States who process, package and distribute the meat in

hermetically sealed containers to retail outlets as food for pets," and that defendants' construction of the statute "will result in depriving plaintiff of the valuable business now received by it from the processors of bulk horse meat, since said processors can avoid the additional freight costs incident to the shipment of unboned carcasses, as well as the cost of boning, by dealing with slaughterers in states other than Illinois." The construction contended for by defendants will not only unreasonably interfere with the sales of horse meat to licensed processors, it will prevent sales of bulk meat in pieces less than quarter carcasses, even though the Director is satisfied, upon evidence satisfactory to him, that the meat will not be resold or again transported, contrary to the provisions of the act. It will add nothing to the protection of the public. The construction contended for by plaintiff recognizes the established course of dealings between slaughterers and processors, and permits sales in special circumstances, where the Director is satisfied, upon proper evidence, that the sale and transportation to the named processor will not result in the resale and transportation in violation of the act. It does not in the slightest degree impair the protection of the public. It is consistent with the legislative intent and the generally accepted meaning of the language used in the act.

The judgment is affirmed.

AFFIRMED.

BURKE, P. J., AND FRIEND, J., CONCUR.

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Bibliography — *See* *Index*.

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PEARL WILSON PLEASANT,
Appellant,

v.

OTHA PLEASANT,
Appellee.

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5 I.A.^{2d} 585
APPEAL FROM
SUPERIOR COURT
COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order setting aside and holding for naught a decree of divorce and an order of default on a motion in the nature of a writ of error coram nobis under section 72 of the Civil Practice Act (Ill. Rev. Stats. 1953, chap. 110, sec. 196), made more than 30 days after the entry of the decree. We need only consider plaintiff's objection that the motion made is an improper remedy for the vacation of a divorce decree.

The jurisdiction of the court in a divorce proceeding is derived from the statute and not from the inherent powers of a court of equity. McFarlin v. McFarlin, 384 Ill. 428. The writ of error coram nobis was a remedy available to vacate a judgment at law in cases prosecuted according to the course of the common law. It is not applicable to statutory proceedings (Department of Public Works et c. v. O'Brien, 402 Ill. 89) or to chancery proceedings (Frank v. Salomon, 376 Ill. 439).

The court erred in entertaining the motion and in entering the order complained of. The order is reversed.

REVERSED.

BURKE, P. J., AND FRIEND, J., CONCUR.

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